Supreme Court, U.S.
FILED

(1)

No. 00- 001871 JUN 14 2001

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANDREW L. MANNING, *et al.*,

Petitioners,

v.

THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly Board of Public Instruction of Hillsborough County, Florida), *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ELAINE R. JONES
DIRECTOR-COUNSEL

NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013-2897
(212) 965-2259

VICTOR A. BOLDEN
(Counsel of Record)
JESSE M. FURMAN
KENNETH D. HEATH
WIGGIN & DANA
One Century Tower
265 Church Street
New Haven, CT 06508-1832
(203) 498-4400

WARREN HOPE DAWSON
DAWSON LAW OFFICE
1467 Tampa Park Plaza
Tampa, FL 33605
(813) 221-1800

Counsel for Petitioners

351 pp

QUESTIONS PRESENTED

The Eleventh Circuit Court of Appeals reversed the District Court's ruling that Respondent Hillsborough County School Board had not eliminated the vestiges of *de jure* segregation and had not demonstrated good-faith compliance with the Court's orders and the Equal Protection Clause. The Eleventh Circuit's opinion raises several questions appropriate for review by this Court. The questions presented are:

1. Whether the burden of proving that current racial imbalances are related to the prior *de jure* segregated school system or later actions by school district officials shifts to the plaintiffs, even though the defendant school system has failed to prove that these racial imbalances are not within its control.

2. Whether a school board seeking relief from a desegregation decree may satisfy the good-faith requirement absent specific proof, or other objective evidence, that it is unlikely to revert to its former unlawful conduct.

3. Whether, under the clearly erroneous standard, the factual findings of the District Court may be disregarded by the Court of Appeals in favor of findings by the Magistrate Judge when the District Court findings are based on extensive documentary evidence and reasonable inferences drawn from facts in the record.

LIST OF PARTIES

1. All African-American children eligible to attend public schools in Hillsborough County, Florida, and their next friends, Petitioners;
2. Darnel Cannon, Petitioner;
3. Nathaniel Cannon, Petitioner;
4. Norman Thomas Cannon, Petitioner;
5. Tyrone Cannon, Petitioner;
6. Andrew L. Manning, Petitioner;
7. Gail Rene Myers, Petitioner;
8. Randolph Myers, Petitioner;
9. Sanders B. Reed, Petitioner;
10. Sandra Reed, Petitioner;
11. Shayron Reed, Petitioner;
12. School Board of Hillsborough County, Florida, Respondent;
13. Glenn Barrington, Respondent;
14. Carolyn Bricklemyer, Respondent;
15. Carol W. Kurdell, Respondent;
16. Jack R. Lamb, Respondent;
17. Joe E. Newsome, Respondent;
18. Candy Olson, Respondent;
19. Doris Ross Reddick, Respondent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. The Decision of the Court of Appeals Conflicts With This Court's Decisions and Those of Other Circuits and Improperly Shifts the Burden of Proof on the Unitary Status Issue to Plaintiffs 8

II. The Court of Appeals' Interpretation of the Good-Faith Standard Conflicts With the Framework Established by this Court's Decisions in *Freeman* and *Dowell* and with the Tenth Circuit's Interpretation 18

III. The Court of Appeals Misapplied Governing Law in its Review of the District Court's Factual Findings 24

CONCLUSION 29

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Bessemer, 470 U.S. 564 (1985).....24, 25, 26, 27

Belk v. Charlotte-Mecklenburg Board of Educ., 233 F.3d 232 (4th Cir. 2000), *vacated and reh'g en banc granted*, Nos. 99-2389 (4th Cir. Jan 17, 2001).....21

Board of Educ. v. Dowell, 498 U.S. 237 (1991).....*passim*

Brown v. Board of Educ., 349 U.S. 294 (1955).....23, 24

Brown v. Board of Educ, 978 F.2d 585 (10th Cir. 1992).....13, 21, 23

Coalition To Save Our Children v. State Board of Educ., 90 F.3d 752 (3rd Cir. 1996).....15, 21

Dowell v. Bd. of Educ., 8 F.3d 1501 (10th Cir. 1993)....14, 19

Freeman v. Pitts, 503 U.S. 467 (1992).....*passim*

Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).....22

Jenkins v. Missouri, 122 F.3d 588 (8th Cir. 1997).....14

Keyes v. School Dist. No. 1, Denver, Colorado, 413 U.S. 189 (1973).....9, 14

Lockett v. Bd. of Educ., 111 F.3d 839 (11th Cir. 1997) (Lockett II).....7

Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987).....20, 22

TABLE OF AUTHORITIES - Continued

Page

Missouri v. Jenkins, 515 U.S. 70 (1995) 10, 17

Peretz v. United States, 501 U.S. 923 (1991) 27

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) 25

Reed v. Rhodes, 179 F.3d 453 (6th Cir. 1999) 15

Swann v. Charlotte-Mechlenburg Bd. Of Educ., 402 U.S. 1 (1971) 10, 11

United States v. City of Yonkers, 181 F.3d 301 (2d Cir.), *vacated and opinion substituted*, 197 F.3d 41 (2d Cir. 1999), *cert. denied*, 529 U.S. 1130 (2000) 15

United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199 (1968) 22

United States v. Raddatz, 447 U.S. 667 (1980) 27, 28

Constitutional Provisions Involved

United States Constitution Article III, § 1 27

United States Constitution Amend. XIV ..... *passim*

Statues and Rules

28 U.S.C. § 1254(1) 2

28 U.S.C. § 636 ..... *passim*

TABLE OF AUTHORITIES - Continued

Page

12 Charles Alan Wright, et al., Federal Practice and Procedure, Civil 2d, § 3068.2 (2d ed. 1997) 27

Fed. R. Civ. P. 52 (a) 25

In the
SUPREME COURT OF THE UNITED STATES

No. 00-_____

ANDREW L. MANNING,
et al., Petitioners
v.
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly BOARD OF PUBLIC INSTRUCTION OF HILLSBOROUGH COUNTY, FLORIDA), *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Andrew L. Manning, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1a-41a, is reported at 244 F.3d 927. The opinions of the District Court, App. 42a-56a, 57a-187a, are reported at 28 F. Supp. 2d 1353 and 24 F. Supp. 2d 1277, respectively. The reports and recommendations of the Magistrate Judge, App. 188a-272a, 273a-314a, are unreported.

JURISDICTION

The Court of Appeals entered its judgment on March 16, 2001. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and 28 U.S.C. § 636(b)(1).

The Fourteenth Amendment provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall . . . deny any persons within its jurisdiction the equal protection of the laws.

28 U.S.C. § 636(b)(1) provides in pertinent part:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

STATEMENT OF THE CASE

This case involves a decision by the Eleventh Circuit reversing a District Court ruling that the School Board of Hillsborough County, Florida, *et al.* ("Respondents") had failed to eliminate the vestiges of the prior *de jure* segregated school system, had not complied in good faith with its orders and the Equal Protection Clause, and therefore had not achieved unitary status. The Eleventh Circuit rejected factual

findings detailing how Respondents failed to prove that it was not responsible for the current racial imbalances in its school system and how Respondents failed to act in ways consistent with the District Court's orders and the Equal Protection Clause. In doing so, the Eleventh Circuit relied on the factual findings made by the Magistrate Judge, findings expressly rejected by the District Court.

The critical issues for purposes of this Petition involve the circumstances arising from Petitioners' allegations of violations of the District Court's orders of May 11, 1971 and July 2, 1971 and the consent order of October 24, 1991.

The 1991 Consent Order modified, but did not replace either the May 11, 1971 Order or the July 2, 1971 Order. Instead, it maintained all of the obligations of these prior orders, but permitted Respondents to convert its student assignment system from single-grade centers to three-grade middle schools and four-grade high schools. App. 68a. With this conversion, Respondents intended to provide for a school system organized into various feeder sets or "clusters," containing two or more elementary schools, one or more middle schools and a single high school. "Because the school system remained under the Court's supervision, [Respondents] were required to propose their Middle School Plan (also known as the 'Cluster Plan') to the Court." App. 67a. In implementing this new student assignment system, Respondents pledged to "minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment [race] ratios." App. 69a.

In 1994, Respondents' implementation of the third year of this new student assignment system exacerbated rather than ameliorated racial imbalances in the school system. At that time, sixteen of Respondents' schools had exceeded the system-wide African-American student race ratios by nearly 20% or more. As a result, Petitioners filed a motion to enforce the District Court's Orders. The District

Court referred the matter to a Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1). After a hearing and extensive briefing, the Magistrate Judge concluded that the School Board's actions violated neither the 1971 nor the 1991 court orders. App. 188a-272a. Following receipt of the Magistrate Judge's report and recommendation as well as objections filed by Petitioners, the District Court determined that the lack of a finding of unitary status "effectively complicate[d] the analysis of the current controversy and demonstrate[d] the need to expand the scope of the inquiry to a full-fledged determination of whether the Hillsborough County school system has in fact achieved unitary status." App. 189a. Following further evidentiary proceedings, the Magistrate Judge concluded in its second report and recommendation that "the public school system of Hillsborough County ha[d] attained unitary status and should be released from Court supervision pursuant to such further Orders as may be appropriate under the circumstances." App. 269a.

Based on its *de novo* review of the Magistrate Judge's report and recommendation, the District Court rejected the critical finding of unitary status, holding that Respondents had failed to eliminate the vestiges of the prior *de jure* segregated school system and had not complied in good faith with the Court's orders and the Equal Protection Clause. App. 186a. Although the Hillsborough County public school system experienced very little increase in the percentage of its black student population during the last quarter century, the District Court concluded that there was substantial racial imbalance in its student enrollment. App. 84a-85a. Sixteen schools had race ratios of African-American schoolchildren far in excess of the 19.4% African-American population system-wide; all but three were elementary schools. *Id.* The Court was not "convinced that a shift in demographics and residential patterns explains the racial imbalances in the Hillsborough County School system." *Id.*

Respondents relied on data "of school-aged children from ages 0-17 to explain enrollment ratios at the elementary schools." App. 98a. As the District Court noted, "the fact that the 0 to 17 age group logically encompasses children too young and too old to attend elementary school, counsel[s] against placing great weight on the use of these statistics." App. 98a. Indeed, on further inspection, the District Court found that "the *total* number of school-aged students in the attendance zones was an overstatement of *actual* attendees at the elementary schools at issue," App. 106a, and that "the percentage of black school children actually attending each school almost always exceeded the 'overstated' percentages . . . ." *Id.* Based on this evidence and evidence presented by Petitioners, the District Court held that Respondents had "failed to prove that the racial imbalances are not traceable, in a proximate way, to the past *de jure* segregation." App. 87a.

The District Court also found that Respondents had not complied in good faith with its orders. The District Court found that Respondents "unilaterally determined that they were not responsible for the racial imbalances; therefore, there was no need to take affirmative steps" to desegregate. App. 105a. In addition, Respondents failed to recognize and adopt common desegregation techniques, even ones included within the District Court's prior orders. App. 134a. This "lack of appreciation cast[] doubt on the competence of the individuals charged with the task of desegregating the schools." *Id.* The District Court concluded that the lack of good-faith compliance with its orders "taint[ed] the analysis of the other facets of the school district's operations," App. 184a-185a, and made it "very difficult in a case such as this to categorize different aspects of the school system and declare individual areas unitary." App. 185a. Therefore, the Court could not make factual findings for partial unitary status on any aspect of the school system.

In a supplemental opinion, following Respondents' motion to alter or amend this judgment, the District Court reiterated the bases for its prior ruling. The District Court again noted "that the racial imbalances in Hillsborough County appear traceable to [Respondents'] prior unconstitutional practices and the continued unconstitutional inaction." App. 53a. The District Court also amplified the basis for its ruling on good faith, finding no basis to conclude that Respondents would not revert to their prior segregated regime. *Id.* The District Court faulted Respondents for failing to submit "documentation of the strategic planning [they] have engaged in to ensure that discrimination does not occur in the future." *Id.* Likewise, the District Court pointed out the failure of Respondents to provide the information necessary to determine the relationship between school site selection and current racial imbalances. *See id.* ("Wouldn't it be great, if, in the future, [Respondents] were able to say: 'Here it is, we looked at the land value, population, growth patterns, budget, racial compositions, etc., *and even more, without having been ordered by the Court to do so*'").

A panel of the Eleventh Circuit reversed the District Court's decision and remanded with instructions to enter judgment declaring Respondents' school system unitary. App. 2a. Rather than rely on the factual findings actually made by the District Court, the Eleventh Circuit concluded that the District Court "seemed to have adopted *in toto* [Respondents'] theory of the case (and the Magistrate Judge's finding)." App. 19a. The Court later noted: "Since the district judge did not observe any of the testimony from the evidentiary hearing, naturally she could not evaluate the credibility of the witnesses." App. 22a.

The Eleventh Circuit then reversed the District Court's ruling on whether the Respondents had met their burden of proof in eliminating the vestiges of the prior *de jure* segregated school system to the extent practicable, holding that the District Court relied on an improper legal

standard. While the existence of racially imbalanced schools required Respondents to "prove that the imbalances are not the result of present or past discrimination on its part," App. 35a (quoting *Lockett v. Bd. of Educ.*, 111 F.3d 839, 843 (11th Cir. 1997) [hereinafter *Lockett II*]), "a school board overcomes this presumption when it shows that some external force, which is not the result of segregation and is beyond the school board's control, substantially caused the racial imbalances." *Id.* Once this standard had been met, the Eleventh Circuit held, "a plaintiff [seeking] to preserve the presumption of *de jure* segregation . . . must show that the demographic shifts are the result of the prior *de jure* segregation or some other discriminatory conduct." App. 36a. Applying this standard, the Eleventh Circuit found that the plaintiffs "merely persuaded the district judge that demographics *alone* did not account for the racial imbalances," a finding "insufficient to deny [the School Board] a declaration of unitary status." App. 36a-37a.

The Eleventh Circuit also reversed the District Court's finding with regard to good faith. Limiting its review to only the issues of "apathy" and the lack of a viable majority-to-minority (MTM) program, the Eleventh Circuit found that neither issue provided a basis for the District Court's decision. According to the Court of Appeals, the District Court's finding of "apathy" amounted to nothing more than an erroneous application of the law. App. 37a. The Court of Appeals rejected the District Court's conclusions with respect to the MTM program on two grounds: (1) even if properly implemented, this program "should have had only marginal relevance in analyzing whether Appellants' 'policies form[ed] a consistent pattern of lawful conduct *directed to eliminating earlier violations*,'" App. 39a (quoting *Lockett II,* 111 F.3d at 843), and (2) discerning a school board's good faith is a "subjective finding," depending "in part on the judge's personal observation of the witnesses." App. 40a. "Where, as here, a district judge does not personally observe the witnesses in

making subjective finding of fact, we view such a finding with skepticism." *Id.*

Having reversed both the District Court's finding on the elimination of vestiges and its finding on good faith, the Eleventh Circuit declared that "federal judicial supervision of the Hillsborough County school system shall cease." App. 40a-41a.

REASONS FOR GRANTING THE WRIT

Petitioners seek this Court's review for three reasons. First, the Eleventh Circuit improperly shifted the burden of proof on the issue of unitary status from the Respondents to the Petitioners, a holding without precedent in this Court or any other Court of Appeals. Second, the Eleventh Circuit narrowed the scope of this Court's good-faith inquiry to require no showing that Petitioners will be free from discrimination in the future. Third and finally, the Court of Appeals disregarded the factual findings of an Article III judge and instead relied on the findings of a Magistrate Judge.

To address the fundamental issues raised herein, this Court should grant certiorari and review the Eleventh Circuit's decision.

I. The Decision of the Court of Appeals Conflicts With This Court's Decisions and Those of Other Circuits and Improperly Shifts the Burden of Proof on the Unitary Status Issue to Plaintiffs

Under existing law, a school board operating under a desegregation decree is not responsible for any racial imbalances that are beyond its control. However, the talismanic invocation of demographic change does not relieve a school board of responsibility to remedy racial imbalances that it has failed to prove are not within its control. Nevertheless, the Eleventh Circuit has now held

that, so long as a "school board shows that demographic shifts are a substantial cause of the racial imbalances," App. 35a, the school board no longer has a burden to explain or address any racial imbalance in its school system and the burden of proof shifts to plaintiffs to establish that vestiges of the *de jure* segregated system still exist. The Eleventh Circuit's ruling represents nothing less than a fundamental re-allocation of the burden of proof in school desegregation cases. It is clearly inconsistent with this Court's precedents and the precedents of other Court of Appeals. As a result, this Court should grant certiorari to review this decision.

It is well settled that, having once violated the constitutional rights of African-American schoolchildren and their parents by maintaining segregated schools, "[t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." *Freeman v. Pitts*, 503 U.S. 467, 485 (1992). Long ago, this Court recognized that, given this past violation, any existing racial imbalance is presumed to be the product of a school system which has decided to return to its old segregative ways. *See Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 208 (1973) ("[A] finding of intentionally segregative school board actions . . . creates a presumption that other segregated schooling within the system is not adventitious"); *id.* at 210 ("[B]e it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts"). As this Court reaffirmed in *Freeman*, "[t]his inquiry is fundamental, for under the former *de jure* regime racial exclusion was both the means and the end of a policy motivated by disparagement of, or hostility towards, the disfavored race." 503 U.S. at 474.

External factors, such as widespread demographic change, can effectively preclude further desegregation and thereby provide an explanation for any current racial imbalance. Racial balance is not to be achieved for its own sake, but rather "is to be pursued when racial imbalance has been caused by a constitutional violation." *Id.* at 494. A school district is under no duty to remedy racial imbalances caused by demographic factors "once the racial imbalance caused by the *de jure* violation has been remedied." *Id.* (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971)). Under such circumstances, this Court's command to desegregate "to the extent practicable" has been satisfied.

The role of the District Court, however, is not to presume that any demographic change or even some substantial degree of demographic change accounts for any current racial imbalance, much less all of it. In *Board of Educ. v. Dowell*, 498 U.S. 237 (1991), this Court required the District Court to consider whether the school district had "made a sufficient showing of constitutional compliance." *Id.* at 249. Before finding that this showing has been made, this Court held, the District Court must engage in a factual determination highly dependent on the circumstances of the case and conclude that, to the extent that demographic change accounts for any racial imbalance, this change is "not attributable to the former *de jure* regime or any later actions by school officials." *Freeman*, 503 U.S. at 496. Nothing in either *Dowell*, *Freeman* or this Court's most recent desegregation opinion, *Missouri v. Jenkins*, 515 U.S. 70 (1995), suggests that, to the extent that a school system wishes to argue that an external factor made further desegregation impractical, the burden for proving this does not fall on the school district or is shifted to the plaintiff schoolchildren.

Furthermore, this Court's examination in *Freeman* of whether "any later actions by school officials," 503 U.S. at

496, could have resulted in the racial imbalance is critical in determining whether a school system has satisfied its burden, even in the midst of demographic change. School board decisions, such as where to locate new school buildings, can influence demographic patterns and promote the re-segregation of a school district. As this Court recognized in *Swann*:

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex . . . . The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

402 U.S. at 20-21; *see also Freeman*, 503 U.S. at 513 (Blackmun, J., with whom Stevens, J., and O'Connor, J., join, concurring in the judgment) ("Close examination is necessary because what may seem to be purely private preferences in housing may in fact have been created, in part, by actions of the school district").

An initially successful desegregation plan does not relieve a school board still under court order from demonstrating that its decisions regarding school construction and school closings did not contribute to any current racial imbalances. *See Swann*, 402 U.S. at 21 ("In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and District Courts to see to it that future school construction and

abandonment are not used and do not serve to perpetuate or re-establish the dual system"); *see also Freeman*, 503 U.S. at 514 (Blackmun, J., concurring in the judgment) ("Because of the various methods for identifying schools by race, even if a school district manages to desegregate student assignments at one point, its failure to remedy the constitutional violation in its entirety may result in resegregation, as neighborhoods respond to the racially identifiable schools"). This Court further defined the burden in *Keyes*:

> [T]he Board's burden is to show that its policies and practices with respect to school site location, school size, school renovations and additions . . . , student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., considered together and premised on the Board's so-called 'neighborhood school' concept, either were not taken in effectuation of a policy to create or maintain segregation in the core city schools, or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools. Considerations of 'fairness' and 'policy' demand no less in light of the Board's intentionally segregative actions.

413 U.S. at 214.

The Eleventh Circuit's "substantial cause" standard does not comply with this Court's precedents. Under this standard, a school district is no longer responsible for any racial imbalance if it can show that external factors are a "substantial cause" of racial imbalance within the school district. App. 35a ("Where a school board shows that demographic shifts are a substantial cause of the racial imbalances, the defendant has overcome the presumption of *de jure* segregation") (citations omitted). A school system is not required to explain, let alone remedy, other "substantial causes," which may be just as significant – or more – or

constitute the predominant basis for the current racial imbalance. *See* App. 35a-36a ("[A] plaintiff does not undermine the strength of a defendant's demographic evidence by merely asserting that demographics *alone* do not explain the racial imbalances. Rather, for a plaintiff to preserve the presumption of *de jure* segregation, the plaintiff must show that that the demographic shifts are the result of prior *de jure* segregation or some other discriminatory conduct") (citations omitted). This approach not only conflicts drastically with the decisions of this Court, but also those of other Courts of Appeals. Indeed, not a single Court of Appeals has applied the burden-shifting test adopted by the Eleventh Circuit.

Not long after *Freeman*, the Tenth Circuit, in *Brown v. Board of Educ*, 978 F.2d 585 (10th Cir. 1992), clearly rejected this approach, reversing a district court for engaging in precisely this type of burden shifting: "Neither *Freeman* nor *Dowell* suggests that the plaintiffs in the remedial phase of school desegregation litigation must make a new showing of discriminatory intent in order to obtain relief from a current condition of segregation. The district court wrongly required the plaintiffs to make such a showing." *Id.* at 589. Rather than adopt a "substantial cause" approach, the Tenth Circuit clarified the "substantial burden" placed on the defendants in these cases. *Id.* at 590 ("In the continuing remedial phase . . . the district court must impose upon defendants the substantial burden of demonstrating the absence of a causal connection between any current condition of segregation and the prior de jure system"). If this burden is not satisfied, "the district court must retain some measure of supervision over the school system." *Id.* (citations omitted).

Under the Tenth Circuit's approach, a school system does not fulfill its burden even with evidence of demographic change, unless the current racial imbalance is "only a product of demographic changes outside the school district's

control." *Id.* at 591. The Tenth Circuit also applied this standard in *Dowell v. Bd. of Educ.*, 8 F.3d 1501 (10th Cir. 1993), requiring factual findings consistent with *Freeman* that the school system did not play a role in, or contribute in any way to, the demographic change. *See id.* at 1511 n.6. The Eleventh Circuit's "substantial cause" standard falls far short of the Tenth Circuit's mark.

The Eighth Circuit has also rejected the Eleventh Circuit's lenient standard. Following the remand after this Court's decision in *Jenkins*, the Eighth Circuit addressed the presumption and expressly rejected the notion that anything short of proof that the racial imbalances resulting from the dual system have been eliminated in their entirety satisfies a school board's burden. *See Jenkins v. Missouri*, 122 F.3d 588, 593 (8th Cir. 1997) ("Only when a school district has attained unitary status does the burden of proving disparities were caused by intentional segregation shift back to the plaintiffs"); *see also id.* at 595 ("'[C]ertainly plaintiffs in a school desegregation case are not required to prove 'cause' in the sense of 'non-attenuation'") (quoting *Keyes*, 413 U.S. at 211 n.17). The Eighth Circuit then upheld the District Court's finding that the School Board had not met its burden for addressing the vestige of student achievement disparities, despite evidence that they were substantially caused by external factors:

> It is evident that the District Court rejected Dr. Armor's opinion that socio-economic factors alone were the cause of the achievement gap in the [Kansas City Missouri School District]. We cannot say that the District Court clearly erred in making this finding. The burden of proof was on the State to prove that it had not caused the gap, and the State's expert could not explain a third of the achievement gap by his socio-economic theory. The State simply failed to carry its burden, and our discussion could end at this point.

Id. at 598. Regardless of the partial contribution of external factors to existing disparities, the Eighth Circuit, like the Tenth Circuit, refused to shift the burden of proof to the plaintiffs and held that the school system had a continuing responsibility to eliminate to the extent practicable those racial imbalances or disparities within its control.[1]

Applying the well-established principles of this Court, the District Court in this case properly found that Respondents failed to meet their burden of proof with regard to current racial imbalances in their school system. While Respondents argued that changing demographics had both caused these racial imbalances and made it impractical to ameliorate them, the District Court found that Respondents had failed to explain numerous decisions that affected school

---

[1] Recent rulings in other Circuits similarly offer no support for the Eleventh Circuit's position. The Sixth Circuit has adopted the *Freeman* approach verbatim, noting that a school district is not required to remedy imbalances caused by demographic shifts "once the racial imbalance due to the de jure violation has been remedied." *Reed v. Rhodes*, 179 F.3d 453, 466 (6th Cir. 1999) (quoting *Freeman*, 503 U.S. at 494). Although the Court there affirmed a finding of unitary status, it based its holding on the absence of any evidence to suggest that the school system's evidentiary burden had not been met, and its opinion provides no support for the Eleventh Circuit's approach. *See id.* at 466-67.

Both the Second and the Third Circuits have held that the burden does shift from the school system to the plaintiff schoolchildren when there had never been a finding of a vestige. *See United States v. City of Yonkers*, 181 F.3d 301, 311 (2d Cir.), *vacated and opinion substituted*, 197 F.3d 41 (2d Cir. 1999), *cert. denied*, 529 U.S. 1130 (2000); *Coalition to Save Our Children v. State Board of Educ.*, 90 F.3d 752, 776 (3d Cir. 1996). This legal distinction is not and could not be the basis for the Eleventh Circuit's decision in this case.

enrollment and that demographic change could not be solely responsible for the racial imbalances. On the first point, Respondents' own analysis failed "to address [their] initial decisions to draw attendance zones, decisions not to act when it was apparent that those zones were inappropriate, or other School Board decisions, such as, location of new schools, or implementation (or lack thereof) of desegregation tools." App. 97a; *cf. Freeman*, 503 U.S. at 515 (Blackmun, J., concurring in the judgment) ("Nor did the court consider how the placement of schools, the attendance zone boundaries or the use of mobile classrooms might have affected residential movement. The court, in my view, failed to consider the many ways [the school board] may have contributed to the demographic shifts").

On the second point, the District Court found Respondents' evidence of demographic change insufficient to prove that they were not responsible for the racial imbalances existing in its schools. *See* App. 86a ("The Court is not convinced that a shift in demographic and residential patterns explains the racial imbalance in the Hillsborough County School System"). Indeed, the demographic evidence presented by Respondents raised more questions than it answered:

> Since the *total* number of school-aged students in the attendance zones was an overstatement of *actual* attendees at the elementary schools at issue, and because the percentage of black school children actually attending each school almost always exceeded the "overstated" percentages, the Court is hesitant to accept [the School Board's] argument that a shift in demography is the sole cause [of] the imbalance in these elementary schools. Moreover, Plaintiffs have provided evidence that the discrepancies were not caused solely by a shift in demography.

App. 106a.

The District Court did not and could not have accepted any demographic data as a basis for releasing the School Board from federal court supervision. If, as was the case here, the demographic evidence did not provide a clear and adequate basis for a factual finding that the School Board did not contribute to or cause the current racial imbalances, then the District Court could not have found that the School Board had met its burden. *See Freeman*, 503 U.S. at 515 (Blackmun, J., concurring in the judgment) ("[T]his Court's decisions *require* the District Court 'to dwell on what might have been.' In particular, they require the court to examine the past to determine whether the current racial imbalance in the schools is attributable in part to the former *de jure* segregated regime or any later actions by school officials"); *cf. Jenkins*, 515 U.S. at 100-01 ("Although the Court of Appeals later recognized that a determination of partial unitary status requires 'careful factfinding and detailed articulation of findings,' it declined to remand to the District Court"). Moreover, following this Court's guidance from *Freeman*, the District Court in this case found that Respondents' history of poor compliance with its orders counseled against a finding that the board had met its burden. *See* App. 86a.[2]

---

[2] Once the District Court concluded that Respondents had failed to satisfy their burden with respect to the area of student assignment, given the interrelationships between this area and the other *Green* factors, the District Court appropriately refused to declare the school district unitary in any area. App. 184a-185a; *see Freeman,* 503 U.S. at 497 ("[T]he *Green* factors may be related or interdependent. Two or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well . . . . As a consequence, a continuing violation in one area may need to be addressed by remedies in another").

In reversing the District Court's decision, the Eleventh Circuit misapplied this Court's precedents. Despite ample evidence in the record in support of the District Court's factual findings, the Eleventh Circuit substituted its novel "substantial cause" standard for the prevailing law. Quite simply, the Eleventh Circuit has created a lesser burden for school systems found previously to have engaged in *de jure* segregation, thereby undermining the constitutional guarantee of equal protection. This lesser burden turns this Court's command to desegregate "to the extent practicable" on its head. By shifting the burden away from the defendant school system, the Eleventh Circuit's approach forces plaintiffs in a school desegregation case, not the school system, the party with control of all of the information explaining the bases for its decisions, to account for racial imbalances in the school system. To address the Eleventh Circuit's fundamental error in the interpretation of this Court's precedents as well as its conflicts with other Courts of Appeals, certiorari should be granted.

II. The Court of Appeals' Interpretation of the Good-Faith Standard Conflicts With the Framework Established by this Court's Decisions in *Freeman* and *Dowell* and with the Tenth Circuit's Interpretation

This Court should also decide whether, and to what extent, a school board seeking relief from a desegregation decree must submit proof of how it plans to comply in the future with the dictates of the Equal Protection Clause. By failing to require such proof, and reversing the findings of the District Court despite evidence that the school board might return to its unconstitutional ways, the Eleventh Circuit disregarded an important element of the framework established by this Court in *Dowell* and *Freeman*. In doing so, moreover, it created an irreconcilable conflict with the Tenth Circuit, which has interpreted *Dowell* and *Freeman* to

require proof of "specific policies, decisions, and courses of action that extend into the future" before a district court may grant relief from a desegregation decree. *Dowell*, 8 F.3d at 1513 (internal quotation marks omitted). For these reasons as well, this Court should grant certiorari.

In *Dowell,* this Court established that a school district seeking relief from a desegregation decree must prove both that "the vestiges of past discrimination [have] been eliminated to the extent practicable," *Dowell*, 498 U.S. at 249-50, and that the school district has demonstrated good faith in complying with its obligations under the Equal Protection Clause and the desegregation decree, *see id.*; *see also Freeman*, 503 U.S. at 491-92. With respect to the latter burden, the Court explained that the good-faith requirement embodies *both* retrospective and prospective elements. First, the school district must demonstrate that it has "operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment" and the court's desegregation decrees. *Id.* at 247. Second, and equally important, a school district once found to have engaged in intentional discrimination must submit objective proof that "it was unlikely . . . [to] return to its former ways." *Id.* As the *Dowell* Court reasoned, "A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future." *Id.* at 249.

In *Freeman*, this Court reaffirmed that the good-faith requirement embodies a forward-looking component. In that case, the Court held that a school district seeking termination or modification of a desegregation decree must first demonstrate "its commitment to a *course of action* that gives full respect to the equal protection guarantees of the Constitution." 503 U.S. at 490 (emphasis added). Proof of such commitment, the Court explained, demonstrates that a school district "will not suffer intentional discrimination in the future," and provides "parents, students, and the public"

with "assurance against further injuries or stigma." *Id.* at 498; *see also id.* at 498-99 ("'A finding of good faith . . . reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual'") (quoting *Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987)). Without such proof, the Court made plain, a school district should not be relieved from a desegregation decree: "When a school district has not demonstrated good faith under a *comprehensive plan* to remedy ongoing violations, we have *without hesitation* approved comprehensive and continued District Court supervision." *Id.* at 499 (citing cases) (emphasis added).

The Eleventh Circuit ignored these pronouncements, and looked only to the past in applying the good-faith requirement in this case. *See* App. 38a (holding that Respondents satisfy the good-faith requirement because they "never violated a court order, never were sanctioned, and consulted extensively with the African-American community . . . prior to implementing new student assignments under the 1991 Task Force Report"). By contrast, the Tenth Circuit has properly interpreted *Dowell* and *Freeman* to require proof of *both* past conduct *and* future plans for a school district to satisfy the good-faith requirement. *See Dowell*, 8 F.3d at 1511-13. As that Court explained the "second," forward-looking "prong" of the inquiry:

> The second prong of the good faith inquiry is whether it is "unlikely that the school board would return to its former ways." *Dowell*, 498 U.S. at 247. In *Freeman*, the Supreme Court explained that "[a] school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations." 503 U.S. at 491. We have since interpreted the good faith showing set out in *Freeman* to mean that "[m]ere protestations of an intention to comply with the

> Constitution in the future will not suffice. Instead, *specific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith.*"

Id. at 1512 (emphasis added) (quoting *Brown*, 978 F.2d at 592). Thus, unlike school districts in the Eleventh Circuit, school districts in the Tenth Circuit are required, consistent with *Dowell* and *Freeman,* to submit proof of "future-oriented board policies manifesting a continued commitment to desegregation" before obtaining relief from a desegregation decree. *Id.* at 1513.

The approaches of the Tenth and Eleventh Circuits are irreconcilable. However, a review of other court of appeals decisions following *Dowell* and *Freeman* reveals that confusion over the interpretation of this Court's holdings runs deeper than conflict between the Tenth and Eleventh Circuits. In *Coalition to Save Our Children v. State Board of Educ.*, 90 F.3d 752, 760 (3d Cir. 1996), for example, the Third Circuit quoted the test from *Freeman*, but failed to engage in any inquiry whatsoever with respect to good faith. By contrast, in *Belk v. Charlotte-Mecklenburg Board of Educ.*, 233 F.3d 232, 252-53 (4th Cir. 2000), *vacated and reh'g en banc granted,* Nos. 99-2389 et al. (4th Cir. Jan. 17, 2001), a panel of the Fourth Circuit held that *Freeman* requires consideration of both the past conduct and future plans of a school district. Unlike the Tenth Circuit, however, the panel of the Fourth Circuit suggested that the latter consideration is part of the inquiry into whether a school district has eliminated the vestiges of discrimination to the extent practicable, not the inquiry into good faith. In short, a review of court of appeals decisions reveals a range of interpretations of the test established in *Dowell* and *Freeman.*

Petitioners submit that, among these varied interpretations, the Tenth Circuit's understanding of the good-faith requirement – requiring proof of *both* past compliance with the mandates of the Equal Protection Clause

and "future-oriented board policies manifesting a continued commitment to desegregation" – is the correct interpretation of this Court's precedent and the Constitution. First and foremost, the Tenth Circuit's approach is consistent with the test established by this Court in *Dowell* and *Freeman* while the Eleventh Circuit's approach is not. For example, the Tenth Circuit's approach to the good-faith requirement takes seriously this Court's statement, quoted above, that a district court prior to vacating or terminating a desegregation decree must find "that it [is] unlikely that the school board would return to its former ways." *Dowell*, 498 U.S. at 247. By contrast, the Eleventh Circuit's approach simply ignores this statement and the others in *Dowell* and *Freeman* like it.

Second, requiring a school district to submit future plans gives force to the constitutional guarantee of equal protection while looking solely at a school district's past conduct does not. In particular, mandating such future-oriented proof distinguishes those school districts that have cynically complied with the literal terms of a desegregation decree, without genuine commitment to the principles of the Equal Protection Clause, from those districts that have truly embraced their constitutional obligations and no longer need judicial supervision to ensure continued compliance. By doing so, the requirement "'reduces the possibility that a school system's compliance with [the dictates of the Equal Protection Clause] is but a temporary constitutional ritual.'" *Freeman*, 503 U.S. at 498-99 (quoting *Morgan*, 831 F.2d at 321); *cf. Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (holding that, when a party asserts that relief is no longer appropriate, that party bears the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again" (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). As the Tenth Circuit explained in *Brown*, "Depending on the definition of 'good faith,' the possibility of immediate resegregation following a declaration of unitariness seems all too real. For

this reason, . . . evaluation of the 'good faith' prong of the *Dowell* test *must* include consideration of a school system's continued commitment to integration." 978 F.2d at 592 (emphasis added).

Further, in light of the "complexities arising from the transition to a system of public education freed of racial discrimination," *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955), the Tenth Circuit's understanding of the good-faith requirement is more pragmatic than the understanding adopted by the Eleventh Circuit. As the record in this case reflects, school desegregation decrees are often in effect for significant periods of time before school districts can even plausibly seek relief from them. Moreover, the decrees required to eliminate all vestiges of an unconstitutional *de jure* system are often ambitious in scope. Under these circumstances, those affected by the decrees – parents, students, teachers, administrators, and the public – come to rely upon the policies enacted pursuant to the decrees. Terminating a decree without some indication from the school district regarding how it plans to comply with the Equal Protection Clause absent the decree risks undermining these settled expectations and, particularly in a large school district, risks wreaking havoc on the school system. By contrast, requiring proof of future-oriented board policies manifesting a continued commitment to desegregation more readily assures an orderly "transition to a system of public education freed of racial discrimination," *id.*, and avoids any potential misunderstanding on the part of parents, students, teachers and the like that actions taken by a school district in the wake of judicial supervision are inconsistent with constitutional requirements.

Applying the Tenth Circuit's correct understanding of the good-faith requirement to this case, there is no doubt that the Eleventh Circuit erred in reversing the finding of the District Court that Respondents failed to demonstrate good faith under *Dowell* and *Freeman*, or that the Eleventh

Circuit's error will harm Petitioners. Putting aside self-serving statements of School Board officials – evidence this Court itself has discounted, *see Dowell*, 498 U.S. at 249 – there is simply no evidence in the record to suggest, let alone prove, "that it [is] unlikely that the school board would return to its former ways." *Id.* at 247. Indeed, the District Court – the court best situated to appraise the school district's compliance, *see Brown*, 349 U.S. at 299 – expressly found, after an exhaustive review of the record, that Respondents "fail[ed] to . . . demonstrate that they have strategically planned for the future." App. 50a. In particular, Respondents failed to submit "documentation of the strategic planning [they] have engaged in to ensure that discrimination does not occur in the future." *Id.* Respondents simply did not give the District Court any indication of what they would do if or when unitary status was granted. In fact, the Respondent School Board members did not even vote on whether to seek unitary status in the first place. (10/25/96 Unitary Status Hearing Tr. at 25-26).

Given the absence of affirmative proof that Respondents were unlikely to revert to their former ways, the District Court's finding that Respondents failed to establish good faith was not error – let alone *clear* error – and, but for its misapplication of the test established in *Dowell* and *Freeman*, the Eleventh Circuit would have been required to affirm. For this reason, and because the Eleventh Circuit's erroneous interpretation of *Dowell* and *Freeman* is in direct conflict with the interpretation of the Tenth Circuit, this Court should grant certiorari.

III. The Court of Appeals Misapplied Governing Law in its Review of the District Court's Factual Findings

It is well settled that a district court's factual findings "'shall not be set aside unless clearly erroneous.'" *Anderson*

v. Bessemer, 470 U.S. 564, 573 (1985) (quoting Fed. R. Civ. P. 52(a)). In *Anderson*, this Court cautioned that when a case turns on the resolution of factual disputes, "the task of appellate tribunals . . . [is limited to] determin[ing] whether the trial judge's conclusions are clearly erroneous." *Id.* at 580-81. Nevertheless, the Eleventh Circuit improperly subjected the District Court's decision to more stringent scrutiny solely because the Magistrate Judge – and not the District Court – conducted the evidentiary hearing in this case, and because the Court of Appeals deemed the Magistrate Judge's credibility determinations "dispositive." App. 40a. A court of appeals is not free to apply an elevated standard of review to the findings of a district court on this basis. For this reason, this Court should review the Eleventh Circuit's decision.

Relying on its decision in *Proffitt v. Wainwright*, 685 F.2d 1227, 1237 (11th Cir. 1982), the Eleventh Circuit wrote that "[i]n other contexts . . . [it] ha[d] cautioned district judges from overruling a magistrate judge's finding where credibility determinations are dispositive." App. 40a. It proceeded to reverse the District Court's decision based upon either its improperly constrained view of the District Court's authority to review the magistrate's findings, App. 40a ("Where . . . a district judge does not personally observe the witnesses in making a subjective finding of fact, we view such a holding with skepticism, especially where, as here, the finding is contrary to the one recommended by the judicial official who observed the witnesses"), or its erroneous application of the prevailing law. App. 20a-21a (("[W]e are convinced that the district judge agreed with the magistrate judge and found that shifting demographics was a substantial cause of the racial imbalances in [Respondents'] student assignments and that [Respondents] did not deliberately cause the racial imbalances"). To reach this conclusion, the Eleventh Circuit relied on two fundamentally flawed premises.

First, the Eleventh Circuit wrongly decided that the District Court's factual findings involved credibility determinations. In fact, they did not. The District Court's factual finding that Respondents failed to present sufficient demographic evidence in order to meet its burden for explaining current racial imbalances in the school system did not turn on the credibility of a witness, but rather on the limitations of the demographic evidence Respondents presented. *See* App. 98a ("[T]he fact that the 0 to 17 age group logically encompasses children too young and too old to attend elementary school, counsel[s] against placing great weight on the use of these statistics"). The District Court's factual finding that the School Board failed to comply in good faith with its orders and the Equal Protection Clause based, in part, on the failure of a School Board official to understand a critical part of the 1971 Order did not turn on the credibility of a witness; indeed, the District Court accepted the School Board officials' statements as true. *See* App. 134a ("It is very disturbing that Defendants' 'in-house' desegregation expert testified that he did not completely understand the import of the MTM program . . . . Certainly, [Respondents] lack of appreciation casts doubt on the competence of the individuals charged with the task of desegregating the schools").

Second, the Eleventh Circuit erroneously held that the type of fact-finding conducted by the District Court is entitled to less deference. As this Court observed in *Anderson*, deference to a District Court's factual findings is warranted under the clearly erroneous standard "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." 470 U.S. at 574. As discussed above, the District Court based its findings both on documentary evidence and inferences from other facts. It was error for the Eleventh Circuit to reverse the District Court's decision "simply because it [wa]s

convinced that it would have decided the case differently." *Id.* at 573.

Certainly, the fact that the Magistrate Judge had engaged in fact-finding does not provide a basis for disregarding the District Court's factual findings. Under 28 U.S.C. § 636, a district court judge must make a *de novo* determination of the magistrate judge's findings. *See United States v. Raddatz*, 447 U.S. 667, 674 (1980) ("It should be clear that on these dispositive motions, the statute calls for a *de novo* determination, not a *de novo* hearing. We find nothing in the legislative history of the statute to support the contention that the judge is required to rehear the contested testimony in order to carry out the statutory command to make the required determination").

A district court's authority to make a de novo determination following a magistrate judge's hearing is essential to protect the rights of the litigants in matters referred by the district court pursuant to 28 U.S.C. § 636(b)(1)(B). As one commentator has observed,

> [c]onstitutional concerns explain the statutory distinction between types of pretrial matters. Motions thought "dispositive" of the action warrant . . . a higher standard of review [by the district court] because "of the possible constitutional objection that only an article III judge may ultimately determine the litigation."

12 CHARLES ALAN WRIGHT, *ET AL.*, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, § 3068.2, at 334 (2d ed. 1997) (citation omitted). This Court has previously recognized that "Article III, § 1 [of the United States Constitution] serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Peretz v. United States*, 501 U.S. 923, 929 n.6 (1991) (internal quotation marks and citations

omitted); *see also Raddatz*, 447 U.S. at 686 (Blackmun, J., concurring) (noting that litigants' rights are adequately protected by the statutes governing referral of matters for decisions by magistrate judges because "the district judge – insulated by life tenure and irreducible salary – is waiting in the wings, fully able to correct errors," and therefore there is no "threat to the judicial power or the independence of judicial decisionmaking that underlies Art. III"). While it is true that "litigants may waive their personal right to have an Article III judge preside over a civil trial," *Peretz*, 501 U.S. at 936, that was not the case here. Petitioners did not consent to trial by the Magistrate Judge in this case, and never waived their right to have an Article III judge ultimately pass upon their claim that Respondents had not achieved unitary status. Under these circumstances, the Eleventh Circuit's notion that the Magistrate Judge's findings concerning unitary status should be adopted conflicts with Petitioners' right to final resolution of their dispute by an Article III judge.

The Eleventh Circuit simply had no basis for disregarding the factual findings of the District Court. It does not promote judicial economy to require a District Court to repeat the evidentiary hearing conducted by a Magistrate Judge pursuant to a 28 U.S.C. § 636(b) referral in order for its findings of fact to receive the deference it is due under the "clearly erroneous" standard. This result is inconsistent with the desire for greater judicial efficiency that motivated Congress to enact § 636(b), and contradicts the legislative scheme, which requires de novo review of dispositive issues addressed by the magistrate judge, except when such proceedings are conducted with the consent of the parties. To review and correct this fundamental legal error, certiorari should be granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Elaine R. Jones
Director-Counsel

Norman J. Chachkin
Jacqueline A. Berrien
NAACP Legal Defense
& Educational Fund, Inc.
99 Hudson Street
Suite 1600
New York, New York 10013
(212) 965-2200

Victor A. Bolden
Counsel of Record
Jesse M. Furman
Kenneth D. Heath
Wiggin & Dana
One Century Tower
265 Church Street
New Haven, CT 06508
(203) 498-4400

Warren Hope Dawson
Dawson Law Office
1467 Tampa Park Plaza
Tampa, Florida 33605
(813) 221-1800

Opinion of the Court of Appeals

United States Court of Appeals,
Eleventh Circuit.

Andrew L. MANNING, a minor, by his father and next friend, Willie MANNING, et al., Plaintiffs-Appellees,
v.
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly Board of Public Instruction of Hillsborough County, Florida), et al., Defendants-Appellants.

No. 99-2049.

March 16, 2001.

***929** Walter Crosby Few, Few & Ayala, Thomas M. Gonzalez, Arnold B. Corsmeier, Thompson, Sizemore & Gonzalez, P.A., Tampa, FL, for Defendants- Appellants.

Victor Allen Bolden, Wiggin & Dana, New Haven, CT, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York City, Warren Hope Dawson, Dawson and Griffin, P.A., Tampa, FL, for Plaintiffs-Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before BLACK, FAY and COX, Circuit Judges.

BLACK, Circuit Judge:

Appellants, the School Board of Hillsborough County, Florida, and its officials, appeal two orders of the district court which subject them to continued supervision under a federal desegregation decree. *See Manning v. Sch. Bd. of Hillsborough*

County, Fla., 24 F. Supp. 2d 1277 (M.D. Fla.), *mot. to alter or amend den., mot. for clarification granted in part,* 28 F. Supp. 2d 1353 (M.D. Fla.1998). Appellants argue that they have eliminated the vestiges of past discrimination to the extent practicable and have fully complied in good faith with the desegregation decree. Accordingly, Appellants claim their school district should be declared unitary and federal judicial supervision should cease. Conversely, Appellees, a class of African-American schoolchildren, contend the school district is not unitary and federal judicial oversight of Appellants remains necessary. We hold that Appellants have achieved unitary status. We reverse and remand for the district court to enter judgment, in accordance with this opinion, declaring the Hillsborough County school system to be unitary.

I. BACKGROUND

A. *Procedural History*

Appellants for many years operated a racially-segregated, dual school system. As a result of the Supreme Court's landmark decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (*Brown I*), Appellees in 1958 filed this class-action lawsuit on behalf of all "minor Negro children and their parents" residing in Appellants' school district.[1] In 1962, the district court found

---

[1]The lawsuit was filed in the Southern District of Florida. In 1962, the Middle District of Florida was created, and the case was transferred to that court's docket on November 2, 1962. In a May 1971 order, the presiding district judge noted that this case was--in 1971--the oldest active case on the docket of the Middle District of Florida. Of course, the same holds true today.

The Honorable Thurgood Marshall, prior to his appointment to the Supreme Court, served as one of the attorneys for Appellees.

that Appellants, by operating a segregated school system, had violated the Fourteenth Amendment. For the next ***930** eight and half years, the district court issued various orders as part of its efforts to remedy the harm caused by Appellants' unconstitutional conduct. *See, e.g., Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 306 F. Supp. 497 (M.D. Fla.1969).

In 1970, our predecessor court examined whether Appellants had sufficiently eradicated the illegal dual school system such that it could be found "unitary." *See Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 427 F.2d 874 (5th Cir.1970). Relying upon the six so-called *Green*[2]

The lead plaintiff was, and still is, Andrew L. Manning; through the many years of litigation, his surname has frequently, and incorrectly, been spelled "Mannings." The institutional defendant was formerly known as the Board of Public Instruction of Hillsborough County. The following are the published opinions arising from this case: *Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir.1960); *Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 306 F. Supp. 497 (M.D. Fla.1969); *Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 427 F.2d 874 (5th Cir.1970); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 796 F. Supp. 1491 (M.D. Fla.1992); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 816 F. Supp. 714 (M.D. Fla.1993); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 149 F.R.D. 235 (M.D. Fla.1993); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 149 F.R.D. 237 (M.D. Fla.1993); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 851 F. Supp. 436 (M.D. Fla.1994). Additionally, a law review article is devoted exclusively to this litigation. *See* Drew S. Days, III, *The Other Desegregation Story: Eradicating the Dual School System in Hillsborough County, Florida*, 61 Fordham L. Rev. 33 (1992).

[2]*Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).

factors, the former Fifth Circuit concluded that, with regard to three factors (transportation, extracurricular activities, and facilities), Appellants had indeed achieved a unitary school district. *See Mannings*, 427 F.2d at 878. Nonetheless, based on its examination of three other factors (faculty desegregation, staff desegregation, and student assignments), the court found Appellants had fallen short and had not attained unitary status. *See id.* The case was remanded to the district court with instructions to remedy the deficiencies. *See id.*

After remand, the Supreme Court, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), gave firm guidance on a district court's equitable power to remedy illegal segregation. On May 11, 1971, just 21 days after *Swann* was decided, the district court directed Appellants to submit a comprehensive desegregation plan that conformed with the requirements of *Swann*. Thereafter, Appellants submitted such a plan, and the district court adopted the plan in its order dated July 2, 1971 (the July 1971 Order). From 1971 to 1991, the district court's supervision of Appellants was governed, with some minor modifications, exclusively by the July 1971 Order.[3]

In 1991, Appellants and Appellees entered into a consent decree (1991 Consent Order). The primary reason for the 1991 Consent Order was to enable Appellants to reorganize the school district, so as to eliminate single grade centers and to create middle schools. The 1991 Consent Order, which was to be implemented over a 7-year period, did not annul the July 1971 Order, but merely modified it.

Appellee moved in 1994 to enforce the 1991 Consent Order. The matter was referred to the magistrate judge who

---

[3]For a summary of the minor modifications, see *infra* note 6.

recommended denying the motion. The district judge, however, deferred ruling on the motion and *sua sponte* recommitted the matter to the magistrate judge to consider whether the school district had become unitary, thereby removing the need for federal judicial oversight.

In October 1996, the magistrate judge conducted a 7-day hearing, at which both sides presented considerable evidence. In August 1997, the magistrate judge issued a detailed report and recommendation wherein she recommended the district court find that Appellants had achieved unitary status and thus should be released from federal judicial supervision. Without holding an evidentiary hearing, the district judge in a 110-page order dated October 26, 1998, rejected in part and adopted in part the magistrate judge's report and recommendation. *See Manning*, 24 F. Supp. 2d at 1277-1335. The district judge concluded that Appellants had not attained unitary status and therefore federal judicial supervision was still warranted.[4] *See Manning*, 24 F. Supp. 2d at 1335. ***931** Within ten days of the order dated October 26, 1998, Appellants filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). The district court, in a 13-page order, denied the motion on December 4, 1998. *See Manning*, 28 F. Supp. 2d at 1361. Within 30 days, Appellants filed a notice of appeal as to the district judge's orders of October 26, 1998, and December 4, 1998.

---

[4]Before the district court, Appellees also argued that, even if the school district were unitary, this status would not constitute a "changed circumstance" warranting a modification or vacation of the 1991 Consent Order. *See Manning*, 24 F. Supp. 2d at 1287-88 (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992)). The district court rejected Appellees' argument. *See id.* at 1288. Since Appellees do not contest this ruling on appeal, we do not address it.

B. *Facts*

To analyze this case that has endured for over 40 years, we first summarize the contents of the July 1971 Order and the 1991 Consent Order, which, with minor modifications, have served as the guideposts for Appellants' journey toward a unitary school district. Then, we set forth the district court's most recent factual findings with respect to Appellants' unitary status.

1. *July 1971 Order*

As previously discussed, the district court ordered Appellants in May of 1971 to submit a comprehensive desegregation plan. The district court stated that the "primary objective" of the plan should be the abolition of segregation. In particular, the district court sought to eliminate, at every school, racial balances where black students comprised more than 50% of the student population. The district court further stated that the "most acceptable and desirable" result would be a white/black ratio of 86%/14% in senior high schools, 80%/20% in junior high schools, and 79%/21% in elementary schools.

The July 1971 Order, which ratified Appellants' proposed desegregation plan, dealt primarily with student assignments in grades one through twelve. For elementary schools, the plan clustered each predominately black school with two to five predominantly white schools. The white schools would be used for grades one through five and would be integrated with black children from "satellite zones"[5] who had previously attended the black school in the cluster. The black school in each cluster would be used as a sixth-grade

---

[5]A satellite zone is an area not contiguous with the main attendance zone for the school.

center and would be integrated with white children who had previously attended the white schools in the cluster.

For junior high schools, each black school would be clustered with one to three white schools. The black schools would be used for seventh grade, and the white schools would be used for eighth and ninth grades. Again, the schools would be integrated with students from satellite zones. For senior high schools, the two black schools would be closed, but their facilities would be used for junior high schools. Through a series of re-zoning and satellite busing measures, the white high schools would be integrated.

With regard to faculty and staff, the district court had previously entered an order on August 25, 1970. In the July 1971 Order, the court found that no additional measures were necessary, and it directed Appellants to continue to abide by the August 25, 1970, order. With respect to transportation, facilities, and extracurricular activities, the July 1971 Order directed Appellants to comply with all previous orders. The order also mandated that all operations relating to these areas should be conducted in a non- discriminatory manner and should be regularly re-examined by Appellants.

The July 1971 Order also remarked on four other topics: (1) majority to minority transfers, (2) other transfer rules, (3) the bi-racial committee, and (4) approval of site locations. Specifically, the district court stated, "Each of these has been required by previous orders of this Court. Some of them may not be required if [Appellants'] plan is effectuated and accomplished." Nevertheless, the district court stated that it was "retaining jurisdiction ***932** and [would] require the continuation of all of these procedures to be available and used as necessary."

Attached to the July 1971 Order were two exhibits which explained the bi- racial committee, majority-to-minority transfers, and other transfer rules. The bi-racial committee was to serve as an advisory body on a number of issues and was to consist of ten members, with Appellants and Appellees each selecting five members. In some instances, the committee was to receive reports about students transferring from their assigned schools. In other instances, Appellants were barred from approving student transfers before considering a recommendation from the committee.

Concerning majority-to-minority transfers, the attached exhibits stated the following:

> Majority to minority transfer--Any student shall be permitted to transfer from a school in which his race is in the majority in order to attend the closest school to his residence in which his race is in the minority.
>
> . . . .
>
> The transfer forms shall be available at each public school in Hillsborough County and the County School offices.
>
> . . . .
>
> The transferee is to be given priority for space and thus the transfer is not to be dependent on space being available.
>
> Transportation will be provided by the School Board in service or in kind to the school to which the transfer is made if that school is more than two miles from the home.

In conclusion, the July 1971 Order stated that Appellants' desegregation plan "fully complie[d] with the [district] [c]ourt's order of May 11, 1971," and that it would "result in the establishment of a unitary school system in Hillsborough County, Florida." The July 1971 Order noted, however, that Appellants had a "continuing responsibility" to ensure the plan would be effectuated. Moreover, each year following the implementation of the July 1971 Order, Appellants filed two reports per year with the district court and provided copies to Appellees. Lastly, the July 1971 Order retained jurisdiction in the district court for "such further action as may be necessary and required."

2. *1991 Consent Order*

Between 1971 and 1991, the modifications to the July 1971 Order were minor.[6] By 1991, however, Appellants had determined, based upon a comprehensive study, that the school district would benefit if middle schools (grades 6-8) were established. To accomplish this, the July 1971 Order had to be modified, because that order had relied extensively on single-grade centers (grades 6 and 7) to desegregate the school district. Thus, Appellants entered into negotiations with Appellees, and the product of those negotiations was the 1991 Consent Order.

---

[6]The modifications included, *inter alia:* changes in transfer rules for children of school employees; approval of a new high school site; changes in academic transfer rules; the closure of certain schools; and the creation of magnet schools. Perhaps, the most significant modification dealt with Lee Elementary School, which by 1974 had a black population in excess of 50%. To correct this imbalance, Appellants, pursuant to the district court's order, converted Lee to a sixth-grade center and transferred the former Lee students (first through fifth graders) to seven other elementary schools.

The centerpiece of the 1991 Consent Order was the Middle School Task Force Report 3 of July 1991 (hereinafter "Task Force Report"), which the district court incorporated into the consent order.[7] The Task Force Report was presented to the school board by a 12-person committee. This committee included Mr. Henry Carley, ***933** President of the Tampa Branch of the NAACP. In addition, a legal committee, consisting of, *inter alia,* Mr. Al Davis of the NAACP, reviewed the Task Force Report, and Appellees' own desegregation expert, Dr. Leonard Stevens, was involved in shaping the Task Force Report. Furthermore, the Task Force Report included two separate position statements prepared by various African-American community groups (Howard W. Blake Alumni Group, Coalition of African American Organizations, Greater Tampa Urban League, Inc., and Beta Sigma Zeta Chapter of Zeta Phi Beta Sorority). In sum, as the 1991 Consent Order explained, the Task Force Report was the result of "extensive discussions" between Appellants and Appellees, and the discussions were designed to "to ensure . . . that plans for the implementation of the [Task Force Report] were formulated in a manner that addressed the interests and concerns of [Appellees]."

The Task Force Report proposed substantial changes to the structure of the school system. Under the July 1971 Order, the school system generally had consisted of five tiers: elementary schools (grades K-5), sixth-grade centers, seventh-grade centers, junior high schools (grades 8-9), and high schools (grades 10-12). In contrast, the Task Force Report called for a three-tier school system: elementary schools (grades K-5); middle schools (grades 6-8); and high schools (grades 9-12).

---

[7]The parties and the district court use interchangeably the terms "Task Force Report" and "Middle School Plan." For the sake of simplicity, we use solely the term Task Force Report.

This new structure would be achieved through a so-called "cluster model," under which 17 clusters would be formed. For each cluster, the high school would serve as the "basic unit" and its students would be drawn from "feeder" middle and elementary schools. The Task Force Report estimated that it would take five to seven years to implement the cluster model.

The cluster model proposed by Task Force Report was undoubtedly the most substantial change to the structure of the school system since the July 1971 Order. The objective of July 1971 Order had been to desegregate the school system. By contrast, one of the primary objectives of the Task Force Report was "to *maintain* a desegregated school system." (emphasis added). In an apparent attempt to meet this objective, the 1991 Consent Order directed Appellants "to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment [race] ratios." Moreover, the 1991 Consent Order assumed that intervening demographic changes might necessitate future modifications in student assignments in order to maintain a desegregated school district.[8]

To further the goal of maintaining desired race ratios, the Task Force Report attempted to project the race ratios at each school after the cluster plan's implementation. In summary, the Task Force Report predicted:

---

[8]This assumption was wrong as a matter of law. External factors which are not the result of segregation and are beyond a school board's control should not be part of the remedial calculus when shaping a federal desegregation decree. *See Missouri v. Jenkins*, 515 U.S. 70, 102, 115 S. Ct. 2038, 2055-56, 132 L. Ed. 2d 63 (1995) (citing *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434, 96 S. Ct. 2697, 2703-04, 49 L. Ed. 2d 599 (1976)); *infra* Part II.B.1.

> The number of schools reflecting a ten or higher percent race ratio variance [from the recommended ratio of 20/80%] will increase from 36 to 46. The plan also increases the number of schools from 56 to 72 that will have an almost perfectly balanced race ratio with a student variance of five percent or less from the recommended ratio of 20/80% ratio.

Appendix 1 of the Task Force Report provided more detail as to the projected racial balance at each school. Fourteen schools were projected to have a 40% or greater black population,[9] and an additional four ***934** schools were projected to have a 39% black population.[10] These projections, as part of the Task Force Report, were incorporated into the 1991 Consent Order--a consent decree to which Appellees were parties.

Along with projecting race ratios, the Task Force Report instituted a variety of programs designed to maintain a desegregated school system. For example, the report implemented magnet programs,[11] which were designed in part "to reduce minority isolation" and "to promote desegregation in

---

[9]The 14 schools, with their projected race ratios, were as follows: Lomax (94%), Edison (64%), Sulphur Springs (59%), Graham (58%), Oak Park (58%), Cleveland (50%), Franklin (47%), Sligh (46%), Lockhart (45%), Palm River (41%), West Tampa (41%), Shaw (41%), B.T. Washington (40%), Witter (40%).

[10]The four schools were Foster, Bing, Dowdell, and Just.

[11]The magnet programs were intended to supplement a traditional curriculum with a focus on special "themes", such as computers and technology or visual and performing arts.

schools."[12] The report also suggested a multi-cultural curriculum for students in all grades and instructional sessions to enable staff to deal with diverse populations.

One omission in the Task Force Report, however, is particularly noteworthy in light of subsequent events: majority-to-minority transfers. Although they had been discussed briefly in the July 1971 Order, majority-to-minority transfers were not mentioned once in the 37-page Task Force Report, nor in the 8 attached appendices, nor in the 1991 Consent Order. Dr. Stevens--Appellees' desegregation expert who helped shape the Task Force Report--admitted at the 1996 evidentiary hearing that majority-to-minority transfers would have been insignificant in alleviating the racial imbalances in the school district.

3. *Factual Findings*

The magistrate judge, in her 1997 report and recommendation, structured her factual findings around the six Green factors,[13] plus a seventh factor, quality of education, which has been used by some courts to evaluate a school district's unitary status. *See, e.g., Mills v. Freeman*, 942 F. Supp. 1449, 1460 (N.D. Ga.1996), *aff'd*, 118 F.3d 727 (11th Cir.1997). In addition, the magistrate judge made factual findings regarding Appellants' good-faith compliance with past desegregation decrees, as required by *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237, 250, 111 S. Ct. 630,

---

[12]In addition, the "racial composition targets for magnet school populations [was] not [to] exceed 40% black."

[13]Those six factors are student assignments, faculty, staff, transportation, extracurricular activities, and facilities and resource allocation. *See Green*, 391 U.S. at 435, 88 S. Ct. at 1693.

638, 112 L. Ed. 2d 715 (1991), and its progeny. Based on all of these findings, the magistrate judge recommended the school district be declared unitary in all respects and that federal judicial supervision of the school district be terminated.

The district judge found that the magistrate judge's report and recommendation was "comprehensive" and "agree[d] with a majority of the [m]agistrate [j]udge's analysis." *Manning*, 24 F. Supp. 2d at 1287. For six of the seven factors (faculty, staff, transportation, extracurricular activities, facilities and resource allocation, and quality of education), the district judge adopted most, if not all, of the magistrate judge's findings.[14] *See id.* at 1316-34. In their brief to this Court, Appellees do not contest the findings related to these six factors, and thus further elaboration is unnecessary except to emphasize that the findings support a declaration of unitary status.

With regard to the remaining *Green* factor (student assignments), the district judge expressed some disagreement with ***935** the magistrate judge. The district judge also differed with the magistrate judge's finding on Appellants' good-faith compliance. As we discuss in Part II, the district judge used an incorrect legal standard. As a result, the district judge's legal conclusion, though based mostly upon the magistrate judge's factual findings, was erroneous. To help illuminate our discussion in Part II, we narrate below the magistrate judge's factual findings related to student assignments and Appellants'

---

[14]Regarding these six factors, the district judge's order is less than clear. After a thorough review, however, we are convinced that the district judge overruled most, and possibly all, of Appellees' objections to the magistrate judge's report and recommendation. The objections sustained by the district judge, if any, are inconsequential to our ultimate holding in this case.

good faith, and we highlight, when necessary, particular findings adopted by the district judge. We also note those few areas where the district judge rejected the factual findings of the magistrate judge.

a. *Student Assignments*

As of the 1995-96 school year, the Hillsborough County school district consisted of approximately 120,000 students, 108 elementary schools, 27 junior high schools, and 15 senior high schools. Relying on a standard proposed by Appellees' and Appellants' experts, the magistrate judge designated any school with a black/white ratio varying plus or minus 20 points from a 20/80 ratio as being "racially identifiable" or "racially imbalanced."[15] It was undisputed that, by the 1971-72 school year, all schools were desegregated. Furthermore, the evidence showed that, at the time of the 1996 evidentiary hearing, approximately 90% of the schools were not racially identifiable. Appellees, however, identified 17 schools as racially identifiable and made these schools the focus of the 1996 evidentiary hearing.[16] Ironically, of these 17 schools, 9 were

---

[15]Since the parties agree on what constitutes a racially identifiable school, we shall accept their definition for purposes of this case and this case only. We pass no judgment on the correctness of this definition.

[16]Both the district judge and the magistrate judge referred to 16 schools. A review of the Joint Pre-Evidentiary Hearing Statement and the report by Appellees' expert reveals that Appellees challenged the racial identifiability of 17 schools. Both the district judge and the magistrate judge omitted Mort Elementary from their findings. This oversight, however, is of no significance. The following are the percentages of black students at each of these 17 challenged schools during the 1972-73 and 1995-96 school years:

among the 14 schools that the Task Force Report projected would have a 40% or greater black population, and two were among the four schools that the Task Force Report projected would have a 39% black population.[17] Immediately after the July 1971 Order was implemented, all of these schools became ***936** racially balanced.[18]

The critical factual question at the evidentiary hearing was whether the racial imbalances at the 17 schools were caused by Appellants' past *de jure* segregation (or other

---

School	Percentage of Black Students, 1972-73	Percentage of Black Students, 1995-96
Robles	24%	91%
Edison	36%	77%
Sulphur Springs	19%	74%
Oak Park	23%	69%
Graham	35%	67%
Foster	21%	61%
Cleveland	26%	58%
Shaw	15%	57%
Witter	18%	54%
Cahoon	21%	53%
Clair Mel	18%	49%
West Tampa	14%	47%
DeSoto	35%	43%
Mort	N/A	43%
Van Buren	17%	53%
Sligh	20%	50%
Dowdell	14%	48%

[17]*Compare supra* notes 9, 10 *with supra* note 16.

[18]One school, Mort, was not listed in the 1971 report submitted by Appellants and thus presumably did not exist at that time.

discriminatory conduct), or whether, instead, the racial imbalances were caused by nondiscriminatory factors and circumstances. In a joint statement submitted prior to the evidentiary hearing, Appellants contended that demographic shifts had caused the schools to become racially identifiable. In the same joint statement, Appellees did not directly rebut Appellants' contention, but instead argued that "[d]emographic change *alone* does not account for the racial identifiability in the Hillsborough County school system." (emphasis added).

To resolve their factual dispute, the parties presented considerable evidence to the magistrate judge, including, *inter alia,* reports on attendance boundaries, demographic reports, and expert testimony. We need not repeat all this evidence here, as it is fully set forth in the opinion of the district court. *See Manning*, 24 F. Supp. 2d at 1290-1312. Instead, we compare the findings of the magistrate judge to those of the district judge.

The magistrate judge, in her report and recommendation, recounted the expert testimony of Dr. David Armor, one of Appellants' experts--testimony that the magistrate judge personally observed. Dr. Armor explained that he reviewed the extensive demographic data contained in a report by Dr. W.A.V. Clark, another of Appellants' experts. Based on this evidence, Dr. Armor opined on the witness stand that "none of the schools that were currently imbalanced . . . were caused by [Appellants'] action[s,]" but rather such imbalances "were caused by demographics." The magistrate judge also reviewed the testimony of Dr. Fred Shelley, Appellees' demographic expert--once again, testimony that the magistrate judge personally observed. Dr. Shelley did not conduct his own demographic study, but rather relied on the data supplied by Dr. Clark (Appellants' expert). Dr. Shelley opined "that it is perhaps difficult to conclude that [the] increase in racial imbalance is attributable solely to the processes of natural

demographic change." In the end, the magistrate judge agreed with Dr. Armor and found that demographic change is the "most likely explanation" for the racial imbalances. The magistrate judge faulted Dr. Shelley for not providing an alternative explanation for the racial imbalances.[19]

The district judge, though not observing any of the testimony, agreed for the most part with the findings of the magistrate judge. In conformity with Dr. Armor's opinion (and the magistrate judge's finding), the district judge found that "[t]here [was] no indication that the racial identity of the schools in Hillsborough County has been deliberately caused by segregative policies or practices by [Appellants]" and that "based on the totality of the evidence, a shift in demographics [was] a substantial cause of the racial identifiability in Hillsborough ***937** County's schools." *Manning*, 24 F. Supp.

---

[19]In his report, Dr. Shelley did not attempt to link the present racial imbalances with past *de jure* segregation, but rather merely tried to prove that demographics *alone* did not cause the upsurge in racially identifiable schools. At the evidentiary hearing, when asked how his report differed from Dr. Clark's report, Dr. Shelley responded:

> My reaction to the report was that, while I thought the demographic analysis was very good, what I felt was missing in the report was how to reason from the analysis of the demographic change that was undertaken to a conclusion that demographic change was the *sole* cause of the observed racial imbalance in the public schools in Hillsborough County.

Tr. of Evidentiary Hearing on October 24, 1996, Vol. 4, at 66 (emphasis added). Dr. Shelley expressed doubts that "one can conclude *without ambiguity* that [the racial] imbalance is caused *only* by natural demographic changes." *Id.* at 66-67 (emphasis added).

2d at 1303, 1310. The district judge likewise was unable to cite, in either of her two orders, any independent demographic evidence put forward by Appellees or an alternative explanation proffered by Dr. Shelley as to the cause of the racial imbalances.

The district judge seemed to have adopted *in toto* Appellants' theory of the case (and the magistrate judge's finding). As the district judge stated time and time again, a shift in demographics was a substantial or significant cause of the racial imbalances, and Appellants did not deliberately cause the racial imbalances. *See id.* at 1293 (stating "that the racial imbalances in the schools [were] not the result of a deliberate attempt by [Appellants] to affect or alter demographic patterns to affect the racial composition of the schools"); *id.* at 1311 (finding "the evidence presented by the parties establishes that a shift in demographics played a significant role in the racial compositions of the schools" and that Appellants had "not 'affirmatively' exacerbated racial imbalances"); *Manning*, 28 F. Supp. 2d at 1356 (stating that "demographics have played a significant role in Hillsborough County"). The district judge even agreed that "[i]t [was] probable that" the 17 challenged "schools would have become racially imbalanced regardless of [Appellants'] efforts." *Manning*, 24 F. Supp. 2d at 1303. Even Appellees' own expert, according to the district judge, "agreed that demographics have played a significant role in Hillsborough County." *Id.* Despite all of the evidence showing that demographics, and not *de jure* segregation, caused the racial imbalances, the district judge ultimately declined to find the school district unitary as to student assignments. The district judge declined to so find because she could not conclude that demographics were the *sole* cause of the racial imbalances. *See id.* at 1302. In the district judge's view, therefore, the legal presumption remained that any racial imbalances were the result of the prior *de jure* segregation. *See Manning*, 28 F. Supp. 2d at 1357.

Finally, we note that the district judge's findings were inconsistent and difficult to follow. For example, the district judge was concerned by Dr. Clark's data, especially with regard to its reliability.[20] *See Manning*, 24 F. Supp. 2d at 1298-1300. Nevertheless, the district judge never stated that the data--which both sides relied upon--was so unreliable so as to undermine her finding that "a shift in demographics [was] a substantial cause of the racial identifiability in Hillsborough County's schools." *Id.* at 1303. Additionally, the district judge remarked that she was "not convinced that a shift in demographics explain[ed] the racial imbalance in the Hillsborough County school system." *Manning*, 28 F. Supp. 2d at 1356; *see also* Manning, 24 F. Supp. 2d at 1293. Yet, in the very same sentence, the district judge also stated that "demographics have played a significant role in Hillsborough County." *Manning*, 28 F. Supp. 2d at 1356. In spite of these inconsistencies, we are convinced that

---

[20]In particular, the district judge noted the following:

> [Appellants'] statistics encompass a larger segment of the population than is useful to explain the deviations in the racial compositions of the unbalanced schools. Specifically, [Appellants] rely on Dr. Clark's use of school-aged children from ages 0-17 to explain enrollment ratios at the elementary schools; however, almost one-half of the children included in this group would not, in fact, be attending an elementary school. Moreover, while a few blocks in an attendance zone may reflect black school-age populations as high as 95%, those few blocks only represent a small proportion of the entire attendance zone. Finally, Dr. Clark's analysis does not address [Appellants'] initial decisions to draw attendance zones, decisions not to act when it was apparent that those zones were inappropriate, or other School Board decisions, such as, location of new schools, or implementation (or lack thereof) of desegregation tools.

Manning, 24 F. Supp. 2d at 1298.

the district judge agreed with the magistrate judge and found that shifting demographics was a substantial ***938** cause of the racial imbalances in Appellants' student assignments and that Appellants did not deliberately cause the racial imbalances.

b. *Good-Faith Compliance*

The magistrate judge concluded that Appellants had complied in good faith with past federal desegregation decrees, as required by *Dowell* and its progeny. 498 U.S. at 249-50, 111 S. Ct. at 638. The magistrate judge's conclusion was based largely on the testimony given during the 7-day evidentiary hearing by a variety of witnesses, including *inter alia:* Dr. Walter Sickles, the school superintendent from 1989 to 1996; Dr. Earl Lennard, the school superintendent as of 1996; five members of the school board; Doris Reddick, the chair of the school board; Andrew Manning, the lead plaintiff in the case since its inception; and Joanna Tokley, the president and CEO of the Urban League.

Dr. Sickles, who had been an employee of the school board since 1969, testified that he believed the school district was unitary in the early 1990's. Dr. Sickles did not seek a declaration of unitary status at that time because he believed Appellees would have opposed and impeded his effort to establish middle schools, which was his top priority. Instead, Dr. Sickles sought Appellees' cooperation in establishing middle schools via the Task Force Report and the 1991 Consent Order. Dr. Lennard, an employee of the school board since 1964, testified that he felt a "moral and legal obligation on the school system to continue a desegregated school system." Five school board members "expressed no misgivings about . . . the intent and ability of the School Board to continue a desegregated school system while receiving input from all members of the community."

Some witnesses "voice[d] concern about what might happen in the future if [c]ourt supervision ended." For instance, Ms. Reddick, the chair of the school board, testified against a finding of unitary status. Nevertheless, when asked by Appellees' counsel what would happen if the school district were found unitary, Ms. Reddick asserted, "[W]e're going to guarantee that students will receive equal education."

The magistrate judge found that for more than 25 years Appellants had complied with the court's orders to desegregate and that not once had Appellants been found in violation of any court order. In addition, the magistrate judge noted that Appellants had "regularly conferred [with Appellees] . . . to ensure that the school system was moving forwards, not backwards, toward compliance with the [c]ourt's orders." Accordingly, "the long history of compliance with the [c]ourt's orders" outweighed the "opinions and the anecdotal evidence offered by [Appellees]." In sum, the magistrate judge concluded, "The testimony of . . . most School Board members, as well as the current superintendent and those responsible for various facets of school operation[,] demonstrates that [Appellants] have accepted the principle of racial equality and will not revert back to a dual school system."

The district judge, however, did not adopt this finding of good faith. Since the district judge did not observe any of the testimony from the evidentiary hearing, naturally she could not evaluate the credibility of the witnesses. Instead, the district judge's finding of bad faith centered upon two interrelated areas of concern: Appellants' "apathy" and the lack of a majority-to-minority (MTM) transfer program.[21] *See Manning*, 24 F. Supp.

---

[21]The district judge and the magistrate judge also extensively discussed some *ex parte* communications between a previous presiding judge and school officials. During the evidentiary hearing,

2d at 1293, 1312-14.

***939** With regard to Appellants' "apathy," the district judge faulted Appellants for not "utiliz[ing] all available techniques [to desegregate] to the maximum extent practicable" and for not demonstrating "that they [were] willing to aggressively desegregate the school district to the maximum

---

Dr. John Heur, a retired school board official who had been responsible for implementing the July 1971 Order, testified that such communications occurred between 1972 and 1974. The magistrate judge found that "[t]hese *ex parte* conversations, while unfortunate, were not initiated by [Appellants] and do not demonstrate a lack of good faith." The district judge agreed, finding that, "standing alone, the *ex parte* communications [did] not evidence bad faith." *Manning*, 24 F. Supp. 2d at 1315. Additionally, Part II of the October 26, 1998, opinion is titled "Good- Faith" and discusses Appellants' magnet programs. *See Id.* at 1314-15. This portion of the opinion is very confusing. It lists the arguments advanced by Appellees regarding magnet schools, but the opinion never states whether it is adopting those arguments. In the opinion of December 4, 1998, the district judge faults Appellants for their failure to develop magnet schools and programs, except for one program at Tampa Bay Technical High School. *See Manning*, 28 F. Supp. 2d at 1359. But neither opinion ever explains how Appellants' actions with respect to magnet programs demonstrated bad faith.

We therefore conclude that the district judge did not base her finding of bad faith upon Appellants' magnet programs. Even if the district judge did, in fact, base her finding of bad faith on Appellants' magnet programs, such a finding would be clearly erroneous. In 1990, Appellants moved to designate a magnet school, but Appellees opposed the motion. In successfully opposing the motion, Appellees argued that "[t]he basic structure of desegregation in [Appellants'] school system has remained constant and effective since 1971," and that a magnet program would "introduce more uncertainty about whether schools will remain desegregated."

extent practicable." *Id.* at 1312, 1335. Additionally, the district judge spoke of missed opportunities and a failure to take "affirmative steps . . . to be released from the [c]ourt's supervision." *Id.* at 1312; *accord Manning*, 28 F. Supp. 2d at 1359 (citing *Lockett v. Bd. of Educ. of Muscogee Sch. Dist.*, 92 F.3d 1092, 1099 (11th Cir.1996) (*Lockett I*)). Nevertheless, after a request by Appellants to clarify exactly what steps should be taken to desegregate to the maximum extent practicable, *see id.* at 1355, the district judge declined to give any specifics.

Related to the issue of apathy is the inaction demonstrated by Appellants in their MTM program. As previously noted, the July 1971 Order directed the establishment of an MTM program. *See supra* Part I.B.1. Under this program, a student who attended a school where his race was the majority would be permitted to transfer to a school where his race was the minority. At the evidentiary hearing, Dr. John Miliziano, who was Appellants' "in-house desegregation expert," expressed ignorance about the requirement to implement an MTM program:

> I dealt with the Biracial Committee for many years, and no member of the committee ever brought that up. And to tell you the truth, I thought it was one of those things that was considered by the court and it was never meant to apply. It wasn't until recently that I, a person who has spent many, many years in dealing with the court order, maybe it's stupidity on my part, but I didn't even know that this hidden clause--this clause, not hidden, but this clause in the [July 1971 Order] meant really anything.

Manning, 24 F. Supp. 2d at 1313. The evidence also showed that, from 1977 to 1996, no student had ever applied for an MTM transfer, and Appellants had not made any effort to

publicize or market the MTM program. *See id.* at 1314; *Manning*, 28 F. Supp. 2d at 1359.

While faulting Appellants on the MTM program, the district judge acknowledged that the July 1971 Order "did not specifically direct [Appellants] to market the [MTM] program." *Manning*, 24 F. Supp. 2d at 1314. Furthermore, the district judge noted (and did not dispute) that no member of the Bi-Racial Committee and no representative of Appellees had complained, prior to the mid- 1990's, about the non-availability of an MTM program. *See id.* at 1313 (quoting testimony of Dr. Miliziano). The district judge also found that when Appellees did raise the lack of an effective MTM program, Appellants announced ***940** the program "to the [school] district as a whole and . . . took action to publish information about the program." *Id.* at 1312.

Although the district judge stated that an MTM program is an "indispensable remedy" and a "useful part of every desegregation plan,"[22] *id.* at 1314, the district judge did not explain why this *particular* MTM program was needed to desegregate the Hillsborough County school district. In fact, as previously mentioned, Dr. Stevens--Appellees' expert who was involved in the negotiations that led to the 1991 Consent Order--conceded that an MTM program would not significantly impact the race ratios at the schools Appellees were challenging as racially imbalanced. Furthermore, the Task Force Report and the 1991 Consent Order (both of which were approved by the

---

[22]The district judge lifted this language from the Supreme Court's opinion in *Swann*, 402 U.S. at 26-27, 91 S. Ct. at 1281. In the very same opinion, however, the Supreme Court warned that "[n]o *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved [in desegregating schools]." *Id.* at 26, 91 S. Ct. at 1281.

district judge) failed to even mention the MTM program. Lastly, notwithstanding the criticism of the MTM program, the district judge spoke favorably of Appellants' overall desegregation efforts. *See, e.g., id.* at 1287 (stating that "[u]ndoubtedly, [Appellants'] desegregation efforts demonstrate significant success"); *id.* at 1311 (stating Appellants "deserve acknowledgment for their desegregation efforts thus far"); *id.* at 1312 (noting Appellants "have been relatively successful in implementing desegregation techniques"); *id.* at 1325 (finding Appellants had acted in good faith with respect to faculty desegregation and commending Appellants for taking recommendations from the Minority Recruitment Task Force).

II. DISCUSSION

A. *Standard of Review*

Where the relief sought in the district court is the dissolution of an injunction, the order of the district court is subject to a mixed standard of review.[23] We review for abuse of discretion the failure to dissolve an injunction as required by law. *See Wilson v. Minor*, 220 F.3d 1297, 1301 (11th Cir.2000). The district court's application of law is subject to

---

[23]We raised *sua sponte* whether appellate jurisdiction existed in this case and requested briefs from the parties. Since this is an appeal of an interlocutory order of the district court refusing to dissolve an injunction, we do possess jurisdiction. *See* 28 U.S.C. § 1292(a)(1). We also raised *sua sponte* whether the notice of appeal was timely filed. Appellants timely filed in the district court a motion to alter or amend judgment under Fed. R. Civ. P. 59(e). As such, Appellants could file their appeal until 30 days after the district court ruled on the Rule 59(e) motion. *See* Fed. R. App. P. 4(a)(4)(iv). Since the Appellants complied with this time limit, we conclude Appellants timely filed their notice of appeal. Thus, we may hear this appeal.

de novo review, while its findings of fact are subject to a clearly erroneous standard of review under Fed. R. Civ. P. 52(a). *See Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir.1997) (quoting *SunAmerica Corp. v. Sun Life Assurance Co. of Can.*, 77 F.3d 1325, 1333 (11th Cir.1996)). A declaration of a school system's unitary status is a finding of fact and thus falls under the clearly erroneous standard of Rule 52(a). *See Lockett v. Bd. of Educ. of Muscogee County Sch. Dist.*, 111 F.3d 839, 841-42 (11th Cir.1997) (*Lockett II*); *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 883 F.2d 945, 952 n. 3 (11th Cir.1989). Under this standard of review, "[w]here there are two permissible views of the evidence, the [district court]'s choice between them cannot be clearly erroneous." *Lockett II*, 111 F.3d at 842; *accord Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985). But where a district court applies an incorrect legal standard which "taints" or "infects" its findings of facts, such findings "lose the insulation of ***941** [Rule] 52(a) and judgment based thereon cannot stand." *Corley v. Jackson Police Dept.*, 566 F.2d 994, 1001 (5th Cir.1978) (internal quotations and citation omitted);[24] *accord Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1502- 03 (11th Cir.1990); *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377, 1381 (11th Cir.1983); *Lincoln v. Bd. of Regents of Univ. Sys. of Ga.*, 697 F.2d 928, 938-39 (11th Cir.1983); *see also Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1227 (11th Cir.2000) (*en banc*) (stating "Rule 52(a) does not inhibit an appellate court's power to correct errors of law").

B. *Analysis*

---

[24]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

1. *General Principles*

Before analyzing the case before us, it is important to recall some general principles. In *Brown I*, the Supreme Court held that *de jure* racial segregation practiced by school districts violates the Fourteenth Amendment. *See Lockett II*, 111 F.3d at 842 (citing *Brown I*, 347 U.S. at 495, 74 S. Ct. at 692). To remedy the illegal conduct, the Supreme Court ordered federal district courts to supervise local officials in desegregating school systems. *See id.* (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 301, 75 S. Ct. 753, 757, 99 L.Ed. 1083 (1955) (*Brown II*)). Federal judicial supervision of local officials, however, was intended to be a temporary measure. *See id.* (citing *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247, 111 S. Ct. 630, 637, 112 L. Ed. 2d 715 (1991)).

A desegregation order is remedial in nature, for it is the means by which victims of discriminatory conduct are restored to the position they would have occupied in the absence of such conduct. *See Missouri v. Jenkins*, 515 U.S. 70, 87, 115 S. Ct. 2038, 2048, 132 L. Ed. 2d 63 (1995) (citing *Milliken v. Bradley*, 418 U.S. 717, 746-47, 94 S. Ct. 3112, 3128, 41 L. Ed. 2d 1069 (1974)). The purpose of federal supervision is not to maintain a desired racial mix at a school. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434-37, 96 S. Ct. 2697, 2704-05, 49 L. Ed. 2d 599 (1976); *see also Freeman v. Pitts*, 503 U.S. 467, 494, 112 S. Ct. 1430, 1447, 118 L. Ed. 2d 108 (1992) (noting that "[r]acial balance is not to be achieved for its own sake"). Rather, a federal court may insist upon a racially balanced school only in those situations where a constitutional violation has caused the school to become racially imbalanced. *See id.* at 494, 112 S. Ct. at 1447. As the Supreme Court instructed 30 years ago, "[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further

intervention by a district court should not be necessary." *Swann*, 402 U.S. at 31-32, 91 S. Ct. at 1283-83. Put simply, a school board has no obligation to remedy racial imbalances caused by external factors, such as demographic shifts, which are not the result of segregation and are beyond the board's control. *See Jenkins*, 515 U.S. at 102, 115 S. Ct. at 2055-56 (citing *Spangler*, 427 U.S. at 434, 96 S. Ct. at 2703-04; *Swann*, 402 U.S. at 22, 91 S. Ct. at 1279).

The ultimate objective of any desegregation order is the "restoration of state and local authorities to the control of a school system that is operating in compliance with the Constitution."[25] ***942** *Id.* at 89, 115 S. Ct. at 2049 (internal quotations and citation omitted). To guide district courts in assessing when it is appropriate to restore local control, the

---

[25]Local control is complementary, not contradictory, to the goal of eradicating illegal discrimination from our nation's schools. The Supreme Court has spoken to this principle:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course. . . . [I]t must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility.

Freeman, 503 U.S. at 490, 112 S. Ct. at 1445.

concept of a "unitary" school system has evolved in federal jurisprudence. *See generally Freeman*, 503 U.S. at 485-92, 112 S. Ct. at 1443-46 (1992). In evaluating whether a school system is "unitary," a district court must carefully assess the facts and utilize its sound discretion to determine (1) whether local authorities have eliminated the vestiges of past discrimination to the extent practicable, and (2) whether local authorities have in good faith fully and satisfactorily complied with, and shown a commitment to, the desegregation plan. *See Lockett II*, 111 F.3d at 842 (quoting *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1425 (11th Cir.1992) (citing *Dowell*, 498 U.S. at 249-50, 111 S. Ct. at 638)). For a district court to determine whether the vestiges of discrimination have been eliminated to the extent practicable, it must examine the six facets of school operation, the so-called *Green* factors: student assignments, faculty assignments, staff assignments, transportation, extra-curricular activities, and facilities. *See id.* (citing *Dowell*, 498 U.S. at 245, 111 S. Ct. at 636 (quoting *Green*, 391 U.S. at 435, 88 S. Ct. at 1693)). Using its discretion, a court may also consider other facets. *See id.* (citing *Freeman*, 503 U.S. at 492, 112 S. Ct. at 1446).

It is not uncommon for plaintiffs in school desegregation cases to allege, as Appellees did here, that racial imbalances in student assignments, are a "vestige of discrimination." Until unitary status is attained, the defendant school board has the burden of showing that any racial imbalance in the school system is not traceable, in a proximate way, to the prior *de jure* segregation. *See Freeman*, 503 U.S. at 494, 112 S. Ct. at 1447. Stated differently, once a plaintiff shows *de jure* segregation (as Appellees did here in 1962, *see supra* Part I.A), a presumption arises that all racial imbalances in a school district are the result of the *de jure* segregation. *See Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208, 93 S. Ct. 2686, 2697, 37 L. Ed. 2d 548 (1973). To rebut this presumption, "a school board must prove that the imbalances are not the result of present or

past discrimination on its part." *Lockett II*, 111 F.3d at 843 (citing *Swann*, 402 U.S. at 25, 91 S. Ct. at 1281); *accord Keyes*, 413 U.S. at 211, 93 S. Ct. at 2699.

2. *District Court's Reliance on* Lockett I

a. *Wrong Legal Standard*

With the foregoing principles and standards in mind, we turn to the case before us. Appellants argue, *inter alia*,[26] that the district court committed reversible error by relying upon our opinion in ***943** *Lockett v. Board of Education of Muscogee County*, 92 F.3d 1092 (11th Cir.1996) (*Lockett I*).[27] In *Lockett I*, a panel of this Court reversed a district court's finding of

---

[26]We need not address every argument advanced by Appellants with which we agree. We pause, however, to highlight Appellants' contention that the district court must provide them with a "precise statement" of their obligations under a consent decree. *See, e.g., Jenkins*, 515 U.S. at 101, 115 S. Ct. at 2055. The district judge avoided this requirement and held that she would not "tell [Appellants] which specific means to employ" for achieving unitary status. *Manning*, 28 F. Supp. 2d at 1360; *see also id.* at 1355 (refusing to describe "specific action" for Appellants to take). Even if we were to hold that Appellants' school district was not unitary, we would nonetheless remand this case with instructions that the district court provide specific guidance on what steps Appellants must take to achieve unitary status. But since we conclude the school district is unitary, *see infra* Part III, there is no need for the district judge to issue a statement, precise or otherwise, on Appellants' obligations.

[27]The district judge was aware that *Lockett I* had been superseded by *Lockett II*, but she justified her reliance on *Lockett I* upon the belief that "*Lockett I* reiterated established principles of law." *Manning*, 24 F. Supp. 2d at 1311. District judges in this circuit, however, are required to adhere to the decisions of this Court and the Supreme Court. *See Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.*, 240 F.3d 956, 965-66 n. 14 (11th Cir.2001).

unitary status and ordered the district court to "retain jurisdiction . . . to monitor the progress of the school district's desegregation efforts" until the school district could show that it "ha[d] desegregated its schools to the *maximum* extent practicable." *Id.* at 1101 (emphasis added). *Lockett I* was subsequently vacated by the same panel. *See Lockett II*, 111 F.3d at 840-45.

The district judge, in relying on *Lockett I*, applied the wrong legal standard. The law does not require, as stated in *Lockett I*, that a school board eliminate the vestiges of past discrimination "to the *maximum* extent practicable." 92 F.3d at 1101 (emphasis added). Rather, the law merely requires that the vestiges of past discrimination be eliminated "to the *extent practicable*." *Lockett II*, 111 F.3d at 842 (emphasis added); *accord Jenkins*, 515 U.S. at 90, 115 S. Ct. at 2050;[28] *Freeman*, 503 U.S. at 492, 112 S. Ct. at 1446; *Dowell*, 498 U.S. at 250, 111 S. Ct. at 638; *United States v. Georgia*, 171 F.3d 1344, 1347 (11th Cir.1999); *Lee*, 963 F.2d at 1425. The district judge incorrectly referred to the "maximum extent practicable (or possible)" standard at least 12 times in her opinion of October 24, 1998, and four times in her order of December 4, 1998. *See Manning*, 24 F. Supp. 2d at 1287, 1289, 1290, 1292, 1293, 1301, 1312, 1326, 1334, 1335; *Manning*, 28 F. Supp. 2d at 1356, 1359, 1360.

---

[28]The district court in *Jenkins* stated that its goal was to integrate the school district to the "maximum extent practicable" and to the "maximum potential." 515 U.S. at 81, 101, 115 S. Ct. at 2045, 2055. The Supreme Court *expressly rejected* this test and held that the proper test was whether the deficiencies "attributable to prior *de jure* segregation had been remedied to the extent practicable." *Id.* at 101, 115 S. Ct. at 2055.

Accordingly, the critical issue is whether the district judge's repeated use of the wrong legal standard sufficiently tainted or infected the findings of fact so as to strip those findings of the insulation normally accorded under Rule 52(a). *See supra* Part II.A; *Corley*, 566 F.2d at 1001. We would not permit an inadvertent use of language by a district court to constitute reversible error. Here, however, we are persuaded that the district judge's mistake is more than mere inadvertence.[29] As we discuss immediately below, the district judge's findings on student assignments and good faith were tainted (and thus stripped of Rule 52(a) protection) because the district judge held Appellants to a higher standard than the law requires.

b. *Application of Wrong Legal Standard to Finding on Student Assignments*

In *Lockett,* the critical issue was, as it is here, whether the racial imbalances in student assignments precluded a finding of unitary status. *See Lockett II*, 111 F.3d at 842, 843. *Lockett II* held that, for a school board to rebut the presumption of *de jure* segregation, the school board had to prove "the [racial] imbalances [were] not the result of present or past discrimination on its part." *Id.* at 843; *see also supra* Part II.B.1. The district court in ***944** *Lockett II* found the school board rebutted the presumption by presenting expert demographic evidence showing the imbalances to be the result

---

[29]The phrase "to the extent practicable" is not meaningless surplusage. As the Third Circuit has noted, "[T]he phrase 'to the extent practicable' implies a reasonable limit on the duration of [the] federal supervision" because "extend[ing] federal court supervision indefinitely is neither practicable, desirable, nor proper." *Coalition To Save Our Children v. State Bd. of Educ. of Del.*, 90 F.3d 752, 760 (3d Cir.1996).

of voluntary housing patterns and demographic change. *See id.* The school board's demographic evidence was not contradicted by plaintiffs' experts. *See id.* The *Lockett II* majority affirmed the district court's finding as not being clearly erroneous. *See id.* at 844.

By contrast, *Lockett I* staked out a position on the law under which school boards would have been held to a higher standard. Instead of affirming, the *Lockett I* panel would have remanded, so the district court could have continued supervising the school board "until such time as a reliable body of data exist[ed] to assure . . . that the school district ha[d] desegregated its schools to the *maximum* extent practicable." *Lockett I*, 92 F.3d at 1101 (emphasis added); *accord Lockett II*, 111 F.3d at 844 (Barkett, J. dissenting). Under *Lockett I*, a school board would have been required to remedy racial imbalances even when "the imbalances [were] caused by circumstances over which the school district has no control." *Lockett I*, 92 F.3d at 1099 (quoted in *Manning*, 24 F. Supp. 2d at 1310). Moreover, according to *Lockett I*, to be declared unitary, it is not enough for a school board to show demographic shifts as the cause of the racial imbalances, as "demographic shifts are not necessarily independent of prior unconstitutional practices."[30] *Id.* at 1099 (cited in *Manning*, 28 F. Supp. 2d at 1359).

---

[30]Judge Barkett, the author of *Lockett I*, further elaborated on this view in her *Lockett II* dissent. In particular, Judge Barkett wrote that it was erroneous to "assume[ ] that as long as a school district can point to some force not directly related to a school district's overt actions which is causing or exacerbating racial imbalances, then the resulting imbalance is not traceable to past practices." *Lockett II*, 111 F.3d at 845 (Barkett, J. dissenting).

Lockett I, however, is not the law of this circuit. Rather, the law of the circuit must be distilled from *Lockett II*. We reiterate that, to overcome the presumption that racial imbalances are constitutionally violative, "a school board must prove that the imbalances are not the result of present or past discrimination on its part." *Lockett II*, 111 F.3d at 843. *Lockett II* stands for the proposition that a school board overcomes this presumption when it shows that some external force, which is not the result of segregation and is beyond the school board's control, substantially caused the racial imbalances. *See id.* (upholding declaration of unitary status when district court found demographic shifts caused racial imbalances); *see also Jenkins*, 515 U.S. at 102, 115 S. Ct. at 2055-56; *contra Lockett II*, 111 F.3d at 845 (Barkett, J. dissenting) (advocating contrary proposition). Where a defendant school board shows that demographic shifts are a substantial cause of the racial imbalances, the defendant has overcome the presumption of *de jure* segregation. *See Lockett II*, 111 F.3d at 843. Courts shall not assume that demographic shifts are a result of the past *de jure* segregation. *Contra Lockett I*, 92 F.3d at 1099 (advocating contrary proposition); *Lockett II*, 111 F.3d at 845 (Barkett, J. dissenting) (same). Such an assumption is improper because " '[i]t is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation, and the law need not proceed on that premise'."[31] *Lockett II*, 111 F.3d at 843 (internal alterations omitted) (quoting *Freeman*, 503 U.S. at 496, 112 S. Ct. at 1448). Lastly, a plaintiff does not undermine the strength of a

---

[31]In addition, "[a]s the *de jure* violation becomes more remote in time and . . . demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system." *Lockett II*, 111 F.3d at 843 (internal alterations included) (quoting *Freeman*, 503 U.S. at 496, 112 S. Ct. at 1448).

defendant's demographic evidence by merely asserting that demographics *alone* do not explain the racial***945** imbalances.[32] Rather, for a plaintiff to preserve the presumption of *de jure* segregation, the plaintiff must show that the demographic shifts are the result of the prior *de jure* segregation or some other discriminatory conduct.

If the district judge had applied *Lockett II*, rather than *Lockett I*, her findings of fact would have led her to the same conclusion as the magistrate judge with respect to student assignments. The district judge, like the magistrate judge, found that demographic shifts were a "substantial" or "significant" reason for the racial imbalances and that the racial imbalances were inevitable, irrespective of Appellants' efforts. *See supra* Part I.B.3.a; *Manning*, 24 F. Supp. 2d at 1303, 1311; *Manning*, 28 F. Supp. 2d at 1356. With this finding of fact, Appellants overcame the presumption that the racial imbalances in student assignments were the result of *de jure* segregation. To preserve the presumption, Appellees were required to show that the demographic shifts were the result of the past segregative practices or some other discriminatory conduct. Appellees made no such showing. The district judge never found that the racial imbalances at the 17 challenged schools were caused by the past *de jure* segregation or other discriminatory acts. In fact, the district judge found the exact opposite. That is, the district judge found that Appellants did not deliberately cause the racial imbalances through segregative policies or practices. *See supra* Part I.B.3.a; *Manning*, 24 F. Supp. 2d at 1310. Appellees merely persuaded the district judge that demographics *alone* did not account for the racial imbalances. *See id.* at 1302 (refusing to find that a "shift in

---

[32]It is elementary that one may not rebut extensive evidence with a scintilla of evidence. *See, e.g.*, 2 *McCormick on Evidence* § 338, at 416 (John W. Strong et al. eds., 5th ed. 1999).

demography [was] the sole cause [of] the [racial] imbalance[s]" in the school system). Such a finding is insufficient to deny Appellants a declaration of unitary status.

Accordingly, by applying the correct legal standard from *Lockett II* to the district judge's findings of fact, we reach the same conclusion as the magistrate judge: Appellants have achieved unitary status with respect to student assignments.

c. *Application of Wrong Legal Standard to Finding on Good Faith*

As discussed previously, the district judge had two interrelated areas of concern which precluded, in her view, a finding of good faith: Appellants' apathy and the lack of an effective MTM program. *See supra* Part I.B.3.b. The district judge's reliance on *Lockett I* undoubtedly infected her finding with regard to Appellants' alleged apathy. The district judge, as noted above, expected Appellants to "desegregate the public schools in Hillsborough County to the maximum extent practicable." *E.g., Manning*, 24 F. Supp. 2d at 1287; *supra* Part I.B.3.b. Such an expectation was erroneous, for the law does not require a defendant school board to take every conceivable step in attempting to desegregate. *See, e.g., Freeman*, 503 U.S. at 493, 112 S. Ct. at 1447 (expressly rejecting premise that "heroic measures must be taken to ensure racial balance"). Thus, the district judge's concern about Appellants' alleged "apathy" was an error of law directly traceable to her reliance upon *Lockett I.*

Further, Appellants' lack of an effective MTM program does not necessarily amount to a finding of bad faith. For instance, in *Lockett,* the school board did not implement its MTM program until years after the desegregation decree was entered and ignored other requirements of the desegregation decree. *See Lockett II*, 111 F.3d at 844; *Lockett I*, 92 F.3d at 1100, 1101. Nonetheless, we affirmed a finding of good faith

based in part on the district court's finding that the school board had never violated a court order, ***946** had never been enjoined or sanctioned, and had consulted with African- American members of the community before modifying the student assignment plan. *See Lockett II*, 111 F.3d at 843-44; *contra Lockett I*, 92 F.3d at 1100, 1101. Likewise, in the case *sub judice*, Appellants never violated a court order, never were sanctioned, and consulted extensively with the African-American community, including Appellees, prior to implementing new student assignments under the 1991 Task Force Report. *See supra* Parts I.B.2 & I.B.3.b. Therefore, based on *Lockett II*, the district judge clearly could have found the Appellants acted in good faith, notwithstanding the lack of a viable MTM program.

Additionally, we are persuaded that, if the district judge had followed the law as set forth in *Lockett II*, she would have concluded that Appellants have acted in good faith. As we explained in *Lockett II*, in determining whether a school board has acted in good faith, a court should not dwell on isolated discrepancies, but rather should "consider whether the school board's policies form a consistent pattern of lawful conduct directed to eliminating earlier violations."[33] *Lockett II*, 111 F.3d at 843 (internal quotations omitted); *see also Freeman*, 503 U.S. at 491, 112 S. Ct. at 1446 (holding that "a court should give particular attention to the school system's record of compliance"). Repeatedly in the October 26, 1998, opinion, the

---

[33]The focus is on the school board's pattern of conduct, and not isolated events, because the purpose of the good-faith finding is to ensure that a school board has accepted racial equality and will abstain from intentional discrimination in the future. *See Lockett II*, 111 F.3d at 843 (citing *Freeman*, 503 U.S. at 498, 112 S. Ct. at 1449). Focusing on isolated aberrations blurs a court's long-term vision.

district judge commended Appellants for their desegregation efforts. *See, e.g., Manning*, 24 F. Supp. 2d at 1287, 1311, 1312, 1325; *supra* Part I.B.3.b. At the end of the opinion, the district judge further commented:

> After evaluating the voluminous record in this case, the Court is convinced that [Appellants] have a short road to travel [to attain unitary status]. Essentially, [Appellants] need to demonstrate that they are willing to aggressively desegregate the school district to the maximum extent practicable.[34]

Manning, 24 F. Supp. 2d at 1335. Based on the foregoing statement, we are convinced that, if the district judge had applied the correct standard, she would have found (as the magistrate judge did) that Appellants acted in good faith, notwithstanding the absence of an effective MTM program and other possible discrepancies.

Our conclusion is buttressed by two other points. First, the MTM program, as conceded by Appellees' expert, would have been ineffective in desegregating the 17 challenged schools.[35] As such, the MTM program should have had only marginal relevance in analyzing whether Appellants' "policies form[ed] a consistent pattern of lawful conduct *directed to*

---

[34]In contrast to the district judge, the magistrate judge recognized that "[a] school board's affirmative duty to desegregate does not require adoption of the most desegregative alternative available."

[35]We are by no means suggesting that a desegregation plan cannot, or should not, include an MTM program. The Supreme Court has spoken favorably of MTM programs. *See Swann*, 402 U.S. at 26-27, 91 S. Ct. at 1281.

eliminating earlier violations." *Lockett II*, 111 F.3d at 843 (emphasis added) (internal quotations and citation omitted).

Second, discerning a school board's good faith is in some respects a subjective finding. Thus, such a finding depends in part on the judge's personal observation of the witnesses. The magistrate judge, not the district judge, observed all of the witnesses at the evidentiary hearing. Granted, the district judge was free under 28 U.S.C. § 636 to make a *de novo* determination of the magistrate judge's findings. In other contexts, however, we have cautioned district judges from overruling a magistrate ***947** judge's finding where credibility determinations are dispositive. *See, e.g., Proffitt v. Wainwright*, 685 F.2d 1227, 1237 (11th Cir.1982) (noting that, in criminal or habeas corpus cases, a district judge's reasons for rejecting a report and recommendation must be consistent with the credibility choices made by a magistrate). In addition, the rationale for deferring to a district court's finding of fact is that a trial judge is aware of the variations in demeanor which bear so heavily in making a subjective determination. *See Anderson*, 470 U.S. at 575, 105 S. Ct. at 1512. Where, as here, a district judge does not personally observe the witnesses in making a subjective finding of fact, we view such a finding with skepticism, especially where, as here, the finding is contrary to the one recommended by the judicial official who observed the witnesses.

III. CONCLUSION

The district judge's finding that Appellants have not achieved unitary status was tainted and infected by reliance on an incorrect legal standard. As such, we reverse the district judge's orders of October 26, 1998, and December 4, 1998. Upon remand, the district court shall enter judgment declaring the Hillsborough County school system unitary. Therefore,

federal judicial supervision of the Hillsborough County school system shall cease.

REVERSED and REMANDED.

Order of the District Court of December 4, 1998

United States District Court,

M.D. Florida,
Tampa Division.

Andrew L. MANNING, et al., Plaintiffs,

v.

THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, Florida (formerly Board of Public Instruction of Hillsborough County, Florida), et al., Defendants.

No. 58-3554-CIV-T-17.

Dec. 4, 1998.

***1355** Victor A. Bolden, Marianne Engelman Lado, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York, NY, Warren H. Dawson, Dawson & Griffin, P.A., Tampa, FL, for Andrew L. Manning, Shayron B. Reed, Sanders B. Reed, plaintiffs.

Thomas M. Gonzalez, Thompson, Sizemore & Gonzalez, P.A., Walter Crosby Few, Few & Ayala, P.A., Tampa, FL, for Board of Public Instruction of Hillsborough County, FL, defendants.

ORDER

KOVACHEVICH, Chief Judge.

This cause comes before the Court on Defendants'

Motion to Alter or Amend Judgment (Docket No. 822)[1] and the Plaintiffs' response (Docket No. 823).

As a preliminary matter, Defendants explain that they have begun to take appropriate steps, including scheduling meetings to conduct open discussions with Plaintiffs and soliciting input from the parents of school attending children and other members of the public. Moreover, Defendants emphasize that they are reviewing desegregation techniques which are available to them. These are certainly positive steps and the Court is anxious to see the results.

Nevertheless, Defendants request a further explanation of this Court's October 26, 1998, Order so that the parties will have a common interpretation of the Order. Defendants state that, "[d]espite numerous readings of the Order, the Defendants and their representatives and counsel are in substantial doubt as to exactly what actions they must, or indeed, may, take in order to satisfy the Court." However, Defendants stress that they do not seek a specific description of what means they may employ to meet the Court's requirements. In other words, Defendants seek a specific description of "the Court's requirements," not a means for meeting those requirements.

---

[1]Defendants file their Motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Rule 59(e) permits a district court to entertain a motion to alter or amend a judgment. A party can invoke the rule to direct a court's attention to matters such as newly discovered evidence or a manifest error of law or fact. A motion to alter or amend a judgment is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment, or to present evidence that was available earlier. Consequently, Defendants' Motion will be treated solely as a Motion for Clarification.

Notwithstanding, Defendants' second paragraph of their memorandum states:

> The Court suggests that the Defendants "should evaluate desegregation tools which have been successful in other districts." (Order, page 109). It refers to "desegregative devices" which were available to the Defendants, but not used. (Order, page 61). It does not, however, describe these opportunities, nor does it provide any other direction.

Defendants then argue in a footnote, "[i]n fact, neither the Plaintiffs nor the Court has pointed to any specific action which the Defendants could or should have taken to meet their obligation to desegregate to the 'maximum extent practicable.'" Contrary to Defendants' assertions, Defendants seek to be told, specifically, which desegregation tools to use.

The Court has already pointed to deficiencies in Defendants' desegregation performance and will not, in fact, describe "specific action" which can be taken. However, if Defendants are unable to discern the appropriate measures to take on their own, the Court will hire experts of its own choosing to carry out the task for Defendants, at Defendants' expense, of course.

In addition, Defendants emphasize that during the course of this litigation, Plaintiffs stated that Defendants were complying with the Court's Desegregation Order, ***1356** and that the plan was effective. Moreover, Defendants improperly raise arguments already considered by the Court concerning Plaintiffs' failure to object to Defendants' actions. Significantly, the Court, not Plaintiffs, must determine whether unitary status has been attained. Any posturing that has taken place between the parties is inconsequential to this Court's determination. Perhaps this concept has hindered Defendants' accomplishments

over the years. Defendants' obligations remain until "the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436, 96 S. Ct. 2697, 49 L. Ed. 2d 599 (1976). A judicial determination as to whether Defendants have accomplished their affirmative duty was never sought until this Court prodded Defendants to see where this case was going. Consequently, the fact that Plaintiffs once argued in a brief that the schools were desegregated, in order to prevent action sought by Defendants, should not be repeatedly emphasized to the Court.

Equally as unproductive, "Defendants ask the Court to consider that 'inaction' by a party who believes it to be consistent with the Court's directive may be error, but is not apathy. They ask as well that the Court remember that the Defendants did not rely solely on the Court's *ex parte* oral interpretations of its Order, but on a more public form of information as well." Defendants continue that the Court should acknowledge that the Court did not require any alteration of Defendants' action since 1974.

If Defendants' feelings have been hurt by the Court's Order denying unitary status; perhaps they expect an apology from the Court. Defendants should refrain from filing any additional motions in an attempt to explain why the Court should not unfairly characterize their inaction. There is a very complex and significant task to be accomplished in Hillsborough County. If attaining unitary status is going to be impaired because Defendants feel that they have been personally offended by constructive, and blatantly honest, criticisms, there are larger problems afoot in Hillsborough County.

On page 19 of their Memorandum, Defendants argue, "[i]f the Court intends a holding in its Order that the Defendants' chances of attaining a finding of unitary status were doomed by acts not taken in 1976, by Board members and administrators who are no longer associated with the School board, then they ask for reconsideration of that conclusion." Apparently, this point needs to be made crystal clear: this case concerns the operations of a public school system, not individuals personally. The school system must be operated on a nondiscriminatory basis and all vestiges of the prior constitutional violations must be eliminated to the maximum extent practicable. This is true regardless of the particular individuals acting for the School Board at any given time. To even suggest that acts not taken by the particular individuals currently sitting on the School Board should not be considered is absolutely ridiculous. The school system does not magically become desegregated simply because the ball has changed hands. Eliminating the vestiges of past discrimination to the maximum extent practicable is not limited to the tenure of individual Board Members. The Court will not address similar arguments raised in Defendants' Memorandum. This is not productive.

Despite Defendants' use of the instant Motion to defend their actions which have already been ruled upon, Defendants have raised genuine issues regarding their obligations. Moreover, Defendants discuss the fact that the 1971 Desegregation Order did not provide much detail and they explain that the School Board needs additional guidance with regards to their obligations.

I. The Nature of the Court's Conclusions Relating to Student Assignment.

In the October 26, 1998, Order, the Court stated that while demographics have played a significant role in

Hillsborough County, the Court is not convinced that a shift in demographics and residential patterns explains the racial imbalance in the Hillsborough County school system. The Court also emphasized that the increase in ***1357** the black population was not nearly as drastic as the increases experienced in cases cited by Defendants. Because the school system has not yet achieved unitary status, Plaintiffs are entitled to a presumption that the current disparities are the result of prior segregation. Defendant has the burden to prove otherwise.

In their Memorandum, Defendants ask the Court to consider whether its inability to determine the extent of the role played by demographics in producing numbers which are central to its concerns, and, by extension, its inability to conclude with certainty whether the schools of Hillsborough County are in fact unitary, are the product of Defendants' counsel's unartfulness in presenting their evidence, as opposed to the reality which that evidence sought, but failed, to portray. Specifically, the Defendants ask the Court to consider whether or not additional or different data are needed, and/or whether further hearings would be helpful.

Undoubtedly, additional data is required. However, this is not simply a "numbers game" and the Court went to great lengths to explain that Defendants have not demonstrated a good faith commitment to desegregating the school system. In order to achieve constitutional compliance, a school district is obligated to comply, in good faith, with the court's desegregation decree and "take whatever [affirmative] steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Bd. of New Kent County*, 391 U.S. 430, 437-39, 88 S. Ct. 1689, 20 L. Ed. 2d.2d 716 (1968).

Defendants need to provide the Court with additional data concerning how successful their desegregation efforts have

been. Significantly, Defendants should provide the Court with statistics regarding the racial compositions of the schools in the county from 1995 to the present. Defendants should explain whether racial compositions have improved or worsened. If they have worsened, Defendants should explain why, and what is going to be done. Defendants should provide the Court with additional data concerning their majority to minority transfer program and explain whether this has been successful. Defendants should look at other school districts similar in size to Hillsborough County and determine whether the transfer program in Hillsborough County can be improved. Defendants should gather current statistics in connection with their magnet schools and programs and determine whether the circumstances have improved since 1995 and whether Defendants' predictions have proven accurate. Moreover, Defendants should compare the quality and success of their magnet schools and programs with other school districts similar in size.

In its Order, the Court directed Defendants' attention to the various other ethnic groups represented in Hillsborough County. Defendants correctly assert that, until a constitutional violation has been alleged and established as to a specific minority, the Court may not issue injunctive relief. However, Defendants can certainly provide accurate statistics to carry their burden. While the parties have been arguing that, for instance, one school is 90% black, it may support Defendants' other demographics statistics to have accurate statistics showing that the school is really 60% black, 20% Hispanic, 5% Asian, 5% other, and 10% white. The County has changed a great deal since 1971 and the Court is interested in a true picture of the composition of the schools, not because a constitutional violation has been alleged, but because Defendants are trying to present an accurate, and current, picture of the school system.

The breakdown of the different ethnic groups is not crucial to Defendants attaining unitary status and Defendants

can present their case anyway they choose. Defendants also seek guidance as to the significance of particular race ratios. Admittedly, the "standard" used has been the Court's 80%/20% ideal. As noted above, the actual populations of ethnic groups in the County may illustrate that a new "standard" should be used or additional factors considered. The use of the 40% threshold is to measure Defendants' effectiveness at desegregating the County schools. Because the parties have not challenged whether the population ***1358** as a whole is roughly 80%/20%, the Court has continued to use this to determine Defendants' progress. Defendants' progress entails not only desegregating the schools because of past discrimination, but demonstrating that it has strategically planned to avoid discrimination in the future. In other words, Defendants do not have to ensure that every school in the system is precisely 80% white and 20% black. However, the Court must have a reference point to evaluate Defendants' efforts. Therefore, Defendants are not held steadfastly to any particular race ratios, but must have reasonable, and supportable, explanations for schools that are substantially disproportionate in their racial composition. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26, 91 S. Ct. 1267, 28 L. ED. 2D.2d 554 (1971).

Defendants claim that the Court fails to provide a "threshold by which racial identifiability may be identified as requiring action." Defendants have the burden to prove that the school system has been desegregated. Until unitary status has been declared, Defendants are required to take affirmative steps to desegregate the system. The Court cannot say that every time an individual school becomes 41% black, action must be taken at that school. But when the system is evaluated in its entirety and several schools are becoming more and more segregated, Defendants must be able to explain why. A 20% variance from the "ideal race ratios," which have yet to be proven inappropriate as a starting point, indicates that a school is on its

way to becoming majority black. The School Board should become concerned enough to investigate its cause, especially if several schools are becoming majority black. The Court has not denied Defendants' request to be declared unitary simply because a school has reached a particular race ratio. However, the Court did issue its ruling based on the increase in the number of schools which indicate a source of concern and Defendants' failure to take affirmative steps or demonstrate that they have strategically planned for the future. It is not the role of the Court to engage in strategic planning. The Court's role is to oversee the strategic planning that is entirely the responsibility of the School Board.

Another comparison to the efforts taken by the school district in *Freeman* is instructive. In *Freeman*, the school district's desegregation plan was adopted by the district court in 1969. *Freeman v. Pitts*, 503 U.S. 467, 471, 112 S. Ct. 1430, 118 L. ED. 2D.2d 108 (1992). "Remarkable changes in the racial composition of the county presented [the school district] and the District Court with a student population in 1986 far different from the one they set out to integrate in 1969." *Id.* at 475, 112 S. Ct. 1430 (emphasis added). The racial proportions of the student population was further described as a "striking change." *Id.* (emphasis added). "The school system that the District Court ordered desegregated in 1969 had 5.6% black students; by 1986 the percentage of black students was 47%." *Id.* (emphasis added). The county also experienced "radical" demographic changes, and, as a result, the northern half of the county became predominately white and the southern half became predominately black. *Id.* "In 1970, there were 7,615 nonwhites living in the northern part of DeKalb County and 11,508 nonwhites in the southern part of the county. By 1980, there were 15,365 nonwhites living in the northern part of the county, and 87,583 nonwhites in the southern part." *Id.* The district court in *Freeman* found that the demographic shifts had an immense effect on the racial compositions of the county's

schools. *Id.* at 476, 112 S. Ct. 1430.

When the school district sought a declaration of unitary status in 1986, the district court noted that the school district "had taken specific steps to combat the effects of demographics on the racial mix of the schools." *Id.* at 479, 112 S. Ct. 1430. The school district, "on its own initiative, started an M-to-M program in the 1972 school year. The program was a marked success. Participation increased with each passing year, so that in the 1986-1987 school year, 4,500 of the 72,000 students enrolled in [the school system] participated." *Id.* (emphasis added). In 1986, the district court found that 19% of the students in the school system had an integrated learning experience as a ***1359** result of the M-to-M program. *Id.* Moreover, as early as 1980, the school district in *Freeman* voluntarily instituted a magnet school program in the schools located in the middle of the county in order to attract students from the segregated northern and southern parts of the county.

The district court found that the school district's actions "achieved maximum practical desegregation from 1969 to 1986." *Id.* at 480, 112 S. Ct. 1430. The district court in *Freeman* also stated that it was "convinced that any further actions taken by defendants, while the actions might have made marginal adjustments in the population trends, would not have offset the factors that were described above and the same racial segregation would have occurred at approximately the same speed." *Id.* at 480-81, 112 S. Ct. 1430 (quoting the district court's opinion).

Conversely, in the case at hand, the increase in black students has only been from 17.4% in 1970, to 19.4% in 1990. This is hardly "striking," "radical," or "remarkable." Furthermore, the M-to-M transfer program has been a marked failure. Defendants had not granted one (1) M-To-M transfer as of 1996. Finally, Defendants failed to develop magnet schools

and programs, except for the magnet program at Tampa Bay Technical High School, until 1993. This Court is not convinced that Defendants' inaction has not contributed to the degree and magnitude of segregation in Hillsborough County's schools. Significantly, each instance of a failure or refusal to fulfill Defendants' "affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459, 99 S. Ct. 2941, 61 L. ED. 2D.2d 666 (1979). If you choose *not* to decide, you have made a choice.

The central question which Defendants seek to have clarified is whether Defendants have an obligation to use any desegregative techniques in response to racial ratios which they did not cause through historical or current unlawful inaction. The only way the Court can possibly answer Defendants' question is with another question: "Who has made the determination that Defendants did not cause the imbalances?" This Court has not made that determination. Although Defendants spend a great deal of effort trying to convince the Court that Plaintiffs, at one time, made that determination, Defendants have missed the point of this litigation. Defendants cannot unilaterally determine that they have not caused the current segregation in the schools. That is precisely why they must continue to take affirmative action to desegregate the schools until they seek unitary status and the Court finds that the school system is unitary. Moreover, Defendants cannot assume that demographic shifts are necessarily independent of prior unconstitutional practices. "The school district bears the burden of showing that no [ ] causal link exists [between the racial imbalances and the prior unconstitutional practices and unconstitutional inaction], and absent such a showing, the district must continue to make affirmative efforts to remedy racial imbalances while subject to court order." *Lockett v. Board of Educ. of Muscogee Co. Sch. Dist.*, 92 F.3d 1092, 1099 (11th Cir.1996).

District courts must assert jurisdiction over school systems in order to ensure compliance with the courts' remedial orders and the Constitution until such time as a district court determines that the vestiges of past discrimination have been eliminated to the maximum extent practicable. In determining whether Defendants have satisfied their burden of proving that the current imbalances in the school system are not the result of present or past discriminatory action, the Court must consider:

> (1) whether the racial imbalances are traceable, in a proximate way, to constitutional violations, (2) whether the school district has exhibited a record of full and satisfactory compliance with the decree, and (3) "whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the laws and the constitution that were the predicate for judicial intervention in the first place."

Lockett, 92 F.3d at 1097 (quoting *Freeman*, 503 U.S. at 494, 112 S. Ct. 1430). The Court ***1360** has considered these factors in its previous order and found that the racial imbalances in Hillsborough County appear traceable to Defendants' prior unconstitutional practices and the continued unconstitutional inaction. Moreover, the Court emphasized that Defendants have not demonstrated a good faith commitment to desegregating the County schools.

"The good faith requirement assures parents, students, and the public that they will be protected against further injuries or stigma, by making 'it unlikely that the school district would return to its former ways.' " *Id.* at 1100 (citations omitted). "[A] finding of good faith . . . reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual." *Id.* (quoting *Morgan v. Nucci*, 831 F.2d

313, 321 (1st Cir.1987)). Defendants have not satisfied this requirement.

The Court cannot tell Defendants which specific means to employ. However, their obligations should be clear. Defendants must make efforts to affirmatively desegregate the school system and submit proof that they have, in fact, done so to the maximum extent practicable. An integral part of this proof will be documentation of the strategic planning Defendants have engaged in to ensure that discrimination does not occur in the future. A history and pattern of good faith and affirmative efforts will speak for itself. School districts, such as the one in Freeman, typically seek unitary status and provide proof of what the school district has done in the past, and, that it is continuing to do everything practicable, but that the demographic changes have been so overwhelming that the continued efforts are ineffective, and, the school district should be released from supervision. Conversely, Defendants have furnished proof that they have done some things in the past, but provided nothing to suggest that the Court should not look at all the things it hasn't done, or the ineffectiveness of what it has done, because there has been a 2% shift in the demography of Hillsborough County.

Defendants have expressed additional concerns because the Court's Order "has imposed on the Defendants several new but unspecified reporting obligations." Specifically, Defendants seek clarification because the Court stressed that Defendants should continue to consider busing burdens in assignment and site selection decisions. The Court is not requiring Defendants to monitor particular statistics in connection with the busing burden. However, the Court wants to emphasize that the busing issue should be considered in Defendants' future decisions. The Court feels compelled to caution Defendants that busing children is of great public importance and failure to account to the public for its decisions could become a huge obstacle down

the road. Moreover, the busing issue is tied to the area of site selection, which has been specifically addressed in this Court's Order and the Supreme Court opinions sited therein. Defendants must consider these interrelated aspects of the school system operations, both now and over the long haul.

Plaintiffs specifically raised the issue of Defendants' failure to document decisions with regards to site selection. Wouldn't it be great if, in the future, Defendants were able to say: "Here it is; we looked at the land value, population, growth patterns, budget, racial compositions, etc., *and even more, without having been ordered by the Court to do so. We considered the burdens imposed on all students in the system; here is what has happened,* along with other important considerations".

Nevertheless, Defendants shall provide the Court with the statistics discussed above concerning racial compositions in the schools since 1995, M-to-M transfers, and comparisons to other districts of similar size. If the statistics demonstrate that the number of schools which are racially imbalanced has increased, Defendants should brief the Court on why this has taken place, who is responsible for taking action, what action will be taken in the future, whether additional experts are needed, and other relevant facts to demonstrate that Defendants have fully embraced their obligations, have a strategy, and will have success in the future. Moreover, if the number of magnet programs in Hillsborough is deficient in comparison to similar ***1361** districts, Defendants should be prepared to explain why.

Defendants also ask the Court to alter its Order and declare the school system unitary in all areas except for student assignment. However, the Court declines to do so at this time because of the new and creative efforts that the Court foresees being implemented in Hillsborough County. "[O]ne of the prerequisites to relinquishment of control in whole or in part is

that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution." *Freeman*, 503 U.S. at 490, 112 S. Ct. 1430. The Court expects that Defendants' future efforts will impact the various operations of the school system and the Court deems it appropriate to retain supervision. The Court has already discussed the relationships between some of the Green factors and further discussion is unnecessary.

Finally, the Court certainly cannot provide the parties with a specific date on which the school system will be declared unitary. Nevertheless, the Court anticipates the parties will have the 2000 Census data available to them by the time Defendants have had sufficient time to demonstrate a pattern of good faith compliance and prove that supervision is no longer necessary. Accordingly, it is

ORDERED that Defendants' Motion to Alter or Amend (Docket no. 822) be **DENIED;** alternatively, the Court has treated Defendants' Motion as a Motion for Clarification which has been addressed above and granted only in part.

Opinion of District Court of October 26, 1998

United States District Court,
M.D. Florida, Tampa Division.

Andrew L. MANNING, et al., Plaintiffs,
v.
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly Board of Public Instruction of Hillsborough County, Florida), et al., Defendants.

No. 58-3554-CIV-T-17.
Oct. 26, 1998.

*1281 Victor A. Bolden, Marianne Engelman Lado, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York, NY, for Andrew L. Manning.

Warren H. Dawson, Dawson & Griffin, P.A., Tampa, FL, Victor A. Bolden, Marianne Engelman Lado, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York, NY, for Shayron B. Reed, Sandra E. Reed, Nathaniel Cannon, Norman Thomas Cannon, Tyrone Cannon, Darnel Cannon, Gail Rene Myers, plaintiffs.

Thomas M. Gonzalez, Thompson, Sizemore & Gonzalez, P.A., Tampa, FL, Walter Crosby Few, Few & Ayala, P.A., Tampa, FL, for Board of Public Instruction of Hillsborough County, FL, J. Crockett Farnell, defendants.

ORDER

KOVACHEVICH , Chief Judge.

This cause comes before the Court on the Court's Order recommitting this matter to the Magistrate Judge for a

determination of whether the Hillsborough County school system has attained unitary status (Docket No. 709), the assigned Magistrate Judge's Report and Recommendation (Docket No. 809), Plaintiffs' Objections to Report and Recommendation (Docket No. 812), Brief in Support of Plaintiffs' Objections (Docket No. 813), and Defendants' Response to Plaintiffs' Objections to Report and Recommendation (Docket No. 815).[1] This action was filed on December 12, 1958.

Plaintiffs represent a class consisting of all black children who attended the public schools of Hillsborough County, and the parents and guardians of those children. The complaint alleged that Defendants, the Hillsborough County School Board (formerly Board of Public Instruction of Hillsborough County), acting under the color of state law, had operated, and continued to operate the public school system in Hillsborough County on a racially segregated basis.

The Court initially dismissed the complaint for the Plaintiffs' failure to exhaust administrative remedies; however, the dismissal was reversed and remanded by the court of appeals. *See Mannings v. Board of Public Instruction*, 277 F.2d 370, 375 (5th Cir.1960). Subsequently, the Court conducted a bench trial and on August 21, 1962, entered an order finding that Defendants were, in fact, maintaining an unlawfully segregated system of public schools. Consequently, the Court enjoined Defendants from operating a racially discriminatory school system and allowed Defendants until October 30, 1962,

---

[1]This Court recommitted this matter to the assigned Magistrate Judge prior to ruling on Plaintiffs' Amended Motion to Enforce (Docket No. 753). The issues raised in said motion are subsumed by the rulings in this Order.

in which to file a comprehensive plan for the desegregation of the Hillsborough County schools.

Despite the several desegregation plans devised by Defendants, the school system remained segregated. *See Mannings v. Board of Public Instruction of Hillsborough County*, 306 F. Supp. 497 (M.D. Fla.1969) . Significantly, in 1971, the United States Supreme Court issued several opinions which defined with particularity the responsibilities of school authorities and the scope of powers of federal courts in eliminating state-imposed segregation in the public school systems. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971); *North Carolina State Bd. of Education v. Swann*, 402 U.S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 91 S. Ct. 1287, 28 L. Ed. 2d 582 (1971); and *Davis v. Board of School Commissioners*, 402 U.S. 33, 91 S. Ct. 1289, 28 L. Ed. 2d 577 (1971). On May 11, 1971, the Court entered an Order explaining that Hillsborough County's school system remained ***1282** segregated and required Defendants to prepare and submit a comprehensive desegregation plan for the Hillsborough County school system.

In the May 11, 1971, Order, the Court explained that, despite the fact that black students comprised only 19% of the total student population, 69% of these students were attending twenty-eight (28) schools which had majority black populations. However, during this same time period, 69% of the white students attended 65 schools which were all, or at least 95% white. The Court emphasized that it had been unable to find a single instance in which Defendants had taken positive steps to end segregation at a black school and, consequently, segregation returned fortuitously. (May 11, 1971, Order at 39).

In order to remedy the constitutional violation, the Court directed Defendants to submit a comprehensive desegregation

plan which was to become effective at the beginning of the 1971-1972 school year, and the Court provided Defendants with the following guidelines:

> (a) The Plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.
>
> (b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

(May 11, 1971, Order at 43-44). The May 11, 1971, Order primarily addressed Defendants' responsibility to remedy the segregative policies and practices in connection with student assignments. However, the Court also reiterated the importance of site location for new schools with regards to desegregation.

On July 2, 1971, the Court approved for implementation the comprehensive plan submitted by Defendants. ("July 2, 1971 or 1971 Order"). The plan approved by the Court provided that none of the established black schools would continue in their then existing configurations. Pursuant to the plan, physical plants that were serviceable would be converted to sixth and seventh grade centers. Those facilities which were not capable of conversion, were closed.

The 1971 desegregation plan was designed to desegregate student enrollments in grades one (1) through

twelve (12); neither kindergarten nor pre-school was included.[2] All schools were assigned attendance boundaries which, when combined with the transportation of certain students, was expected to eliminate all majority black schools. The students attending the predominately black schools were assigned to various schools based on the location of their residence or the transportation of groups of these students from satellite zones.[3] As a result, black students were transported to provide racially mixed populations for grades one (1) through five (5), and eight (8) through twelve (12), whereas, white students were transported to sixth and seventh grade centers.

After the Court entered the July 2, 1971, Order, Plaintiffs filed a motion which requested that any desegregation plan adopted by the Court "include faculty desegregation and policies and general reporting provisions and that the Court retain jurisdiction." (Docket No. 243). The Court subsequently required Defendants to submit reports and retained jurisdiction, but did not grant Plaintiffs' request regarding faculty and staff assignments. Nevertheless, in a previous Order issued on August 25, 1970, the Court had directed that principals, teachers, teacher-aides, and other staff, who work directly with children at a school, be assigned so that the staff's racial composition would not reflect any intention that the school be either black or white. Teachers and other staff members were to be assigned so that the race ratio ***1283** would be

---

[2]Initially kindergartens did not exist in the public school system; therefore they were excluded by the 1971 Plan. Subsequently, kindergartens were established by the School Board and the Court entered an Order which permitted kindergarten students to attend neighborhood schools, without regard to student race ratios.

[3]A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding a school.

substantially similar to the system-wide ratio. In its July 2, 1971, Order, the Court continued these requirements, but specifically declined to require any detailed procedure with regard to faculty assignments, noting that, faculty desegregation "was accomplished at every school location in the 1970 school year;" therefore, no procedural requirements were necessary.

Also, in the July 2, 1971, Order, the Court explained that the previously ordered relief of majority-to-minority transfers, other transfer rules, and Bi-Racial Committee approval of site locations, may not be required if Defendants' plan was effectuated and accomplished. However, the Court required the continuation of each of these requirements "to be available and used as necessary." (July 2, 1971, Order at 9). In addition, the Court ordered Defendants to regularly reexamine their transportation system, all facilities, and all extracurricular activities, in order to assure that they were maintained, operated, and conducted on a nonsegregated, nondiscriminatory basis. *Id.* at 10.

In the 1971-1972 school year, the School Board had desegregated all Hillsborough County Schools, with regards to student assignment; no majority black school existed in the county. (T1 at 13).[4] Each year following implementation of the 1971 Plan, Defendants filed at least two (2) reports with the Court, copies of which were served upon opposing counsel. The first report provided enrollments by race and grade, as well as, faculty assignments, by race, at each school facility operated for grades one (1) through twelve (12) in the system. The

---

[4]Reference to the parties' exhibits at the unitary status hearing are denoted by the letters "PX" or "DX" followed by the exhibit number. References to the seven (7) volume transcript of the hearing are denoted by the letter "T" followed by the volume and page number.

second report enumerated proposed changes in student assignments, if any, which would become effective in the following school year. (DX 6 and 7). The reports of proposed student assignment modifications included, *inter alia,* boundary changes occasioned by overcrowding and student assignment modifications necessitated by the construction of new schools. The reports also included projections of anticipated enrollments, by race, at schools affected by the proposed changes. Joint Pre-Evidentiary Hearing Statement, (Docket No. 767), Statement of Admitted Facts at § 13 ("Stipulation").

As of October 27, 1971, there were no majority black schools among the school district's 122 schools and only one (1) school, Lee Elementary, was more than 40% black. However, during the next few years, the percentage of black students increased at several schools. For example, during the next two (2) years, Edison Elementary became 40% black, DeSoto Elementary became 39% black, and Gary Elementary became 39% black. (DX 7).

The 1974 Annual Report submitted by Defendants reflected that there were 128 public schools in Hillsborough County. The report also indicated that one (1) school, Lee Elementary, had become majority black. In addition, Cleveland, DeSoto, Edison, and Gary Elementary had black student populations which exceeded 40%. After receiving this report, the Court, *sua sponte,* directed Defendants to file a supplemental plan designed to insure that, "the requirements of the Court's previous orders insofar as they relate to Lee Elementary School will be complied with as of the beginning of the 1975-1976 school year." (January 14, 1975, Order at 1); (Stipulation at § 9). In addition, the Court directed Defendants' attention to the other schools in the system which were experiencing disproportionate increases in black students. *Id.*

On March 21, 1975, the School Board submitted a supplemental plan to the Court. Defendants' plan proposed to convert Lee Elementary to a sixth grade center replacing the Meacham facility. Moreover, the plan proposed to reassign Lee's former attendance area among seven (7) different elementary schools for grades one (1) through five (5). (Stipulation at § 10). On June 3, 1975, the Court ordered implementation of the supplemental plan for Lee Elementary commencing with the 1975-1976 school year. (Stipulation at § 11).

The 1975 Annual Report reflected that there were no majority black schools. However, five (5) schools, out of 128, had student ***1284** populations which were greater than 40% black (Cleveland, Edison, Gary, Graham, and Palm River elementary schools). During the 1975-1976 school year, Cleveland became a majority black school (55%). In addition, Edison became 47% black, Gary became 47% black, and Graham became 49% black. Despite the projected student populations delineated in Defendants' supplemental plan, there was no decrease in the percentage of black students in attendance at Cleveland and Gary. (DX 7).

At least since January 14, 1975, the Court has not directed the School Board to prepare a supplemental plan or to take any action with respect to the racial composition of any of its schools. Moreover, Plaintiffs did not seek relief or enforcement of any obligation imposed by the Court until June 1994. Furthermore, Plaintiffs did not file written objections with the Court respecting the actual or projected enrollments of any schools in Hillsborough County. (Stipulation at § 15). In 1980, Plaintiffs objected to the proposed closing of George Washington Junior High School and Glover Elementary; however, Plaintiffs' stated reasons were not related to the anticipated racial compositions of the affected schools.

In 1990, Plaintiffs objected, for reasons other than anticipated racial composition, to the proposed conversion of Blake seventh grade center to a high school. The Court disapproved Defendants' proposal, without prejudice to subsequent resubmission as part of a comprehensive restructuring plan. (Docket No. 419).

Since the 1977-1978 school year, Defendants have made more than 300 modifications in student assignments to relieve overcrowding, to accommodate the opening of newly constructed facilities, or for other reasons, but not specifically for the purpose of affecting the race ratio of a school. (Stipulation at § 19); (DX 6); (T2 at 15). Although changes to attendance patterns have not been made specifically to address race ratios at the schools, Defendants have taken into account the effect of the change on the racial composition of the schools. (Stipulation at § 22); (T1 at 15, 23).

The Bi-Racial Committee, required by the July 2, 1971, Order, has existed since the time of the Order and has reviewed proposed boundary changes, the sites of new schools, and special assignments in accordance with the Court's Order. (T1 at 18-19). The Bi-Racial Committee provides input and advice on these proposals before they come before the School Board (T1 at 19-20). However, the Bi-Racial Committee is strictly an advisory board and does not have the authority to either approve or reject boundary changes. (T1 at 19).

In addition, while making adjustments to student assignments to deal with problems of overcrowding or with new school construction, Defendants, where practicable, reassigned, or divided and partially reassigned, existing satellite zones in a manner that moved enrollments toward the system-wide race ratio. (Stipulation at § 23); (T1 at 25-27); (DX 4). For instance, when the School Board constructed a new facility in an area having a small resident black student population within the

contiguous zone surrounding the facility, the School Board reassigned preexisting satellite zones to increase the number of black students assigned to the new facility. (Stipulation at § 24); (T1 at 26, 33).

When modifying student assignments to relieve overcrowding or in connection with the opening of a new facility, the School Board has, since the 1975-1976 school year, created non-contiguous zones or satellites in at least seven (7) instances. In most instances, students reassigned on a non-contiguous basis were being transported to their former school of assignment before the change. (Stipulation at § 25). However, the School Board has never created a new non-contiguous or satellite zone solely for the purpose of altering the racial enrollment at a school, including schools which were majority black. (Stipulation § 26); (T1 at 14-15).

Since 1986, Defendants have not initiated boundary changes, not otherwise being considered for reasons such as overcrowding or the opening of a newly constructed facility, for the purpose of altering the racial composition at a school, including those schools that had majority black enrollments. (Stipulation § 27).

***1285** The majority to minority ("MTM") transfer program which was required by the July 2, 1971, Order has existed since the time of the Order. However, this program has not been widely publicized in the past. Notwithstanding, the School Board recently directed that the program be publicized and the school district's staff has announced the program to the entire district in recent years. (T1 at 89, 92).

In November 1989, the Hillsborough County Superintendent of Schools, Dr. Walter L. Sickles, appointed a Task Force to Modify Single Grade Centers to investigate and make recommendations for reorganizing the school system so

as to establish middle schools. (Stipulation at § 28). A goal to be achieved by any recommended reorganization was the retention of a desegregated school system. (Stipulation at § 29). In late 1990 or early 1991, the School Board suggested to Plaintiffs' counsel that representatives of the parties and their counsel meet to consider the tentative Middle School Plan being developed by the Task Force, to determine whether a joint submission of the plan could be made to the Court. (Stipulation at § 30).

In early 1991, the Assistant Superintendent, James Randall, had an initial meeting with counsel for Plaintiffs. A more extensive meeting with counsel took place on March 15, 1991, attended by counsel for the parties, Dr. Sickles, Mr. Randall, and other staff members of the district, as well as, by Plaintiffs' educational and desegregation consultant, Dr. Leonard Stevens. (Stipulation at § 31). In connection with the March 15, 1991, meeting, Plaintiffs' representatives were provided with a document entitled "Proposed Cluster Plan," which described the working concept of a middle school reorganization which was being considered by the Task Force. (Stipulation at § 32). After several subsequent meetings, a formal report entitled "Middle School Task Force Report 3, July 1991" ("Task Force Report") was submitted to and approved by the School Board. The Task Force Report was tendered to Plaintiffs on August 20, 1991. (Stipulation at § 35).

Because the school system remained under the Court's supervision, Defendants were required to propose their Middle School Plan (also known as the "Cluster Plan") to the Court. The parties proposed an agreed order to the Court, which was approved and entered on October 24, 1991 ("Consent Order"). The Court explained that the Consent Order was the "result from the school district's comprehensive study of the educational advantages of reorganizing its grade structure to establish 'middle schools' serving grades 6-8, and that the

School Board's conclusion, following that study, that implementation of the middle school grade structure is desirable." (1991 Consent Order at 1). The Task Force Report was attached to and made a part of the Consent Order. (Stipulation at § 36).

The Task Force Report proposed modifications which were projected to be implemented over a seven (7) year period. The modifications included grade organization and student assignments in Hillsborough County in order to accommodate the establishment of middle schools. (1991 Consent Order at 2). Prior to implementation of the Cluster Plan, Hillsborough County public school students progressed from elementary schools, to single sixth or seventh-grade centers, which were established for desegregation purposes under the original desegregation plan, to junior high schools, and then to high schools. However, under the Middle School Plan, students would progress from kindergarten through fifth grade elementary schools, to middle schools having sixth, seventh, and eighth grades, and then to high schools. Thus, the single grade centers were to be converted to middle schools. In addition, implementation of the Middle School Plan involved creating attendance "clusters" which grouped elementary and middle schools around the high school which those students ultimately would attend. (Task Force Report at 10).

The Middle School Plan also involved the creation of magnet programs at some schools. (Task Force Report at 17-25). One of the purposes of developing the magnet programs was to help desegregate the schools. Some of the schools which were targeted for the programs were predominately black prior to 1971 and the School Board anticipated that these schools would become "black schools" again if the student ***1286** population was comprised solely of students from the surrounding neighborhoods as a result of the Middle School

Plan. (T1 at 66). The programs were designed to perpetuate racial balance. (T1 at 66-67).

> In the 1991 Consent Order, the Court explained that: The Court recognizes and anticipates that there will be modifications each year of the projected student assignment patterns contained in Appendix 1 to the Task Force Report to take account of demographic or other changes that occur. In making such modifications, the school district should seek to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14).

(1991 Consent Order at 5-6). However, in the Task Force Report, the School Board predicted that, under the Middle School Plan, there would be an increase, from thirty-six (36) to forty-six (46), in the number of schools that deviated from the 20/80 ratio by 10% or higher, and, an increase, from fifty- six (56) to seventy-two (72), in the number of schools that deviated from the 20/80 ratio 5% or less. Therefore, while the Middle School Plan was projected to increase the number of schools which had racial compositions closer to the district-wide ratio, the plan contemplated an increase in the number of schools that significantly varied from the 20/80 ratio.

The 1993 Annual Report reflects that the school system was comprised of 151 schools. As of the time of the report, there were eight (8) elementary schools and one (1) junior high school with student populations which were 50% or more black. Notably, Cleveland Elementary was 59% black and Robles Elementary was 90% black. In addition, there were five (5) elementary schools and two (2) junior high schools with student populations which were more than 40% black. (DX 7).

At the time of the 1996 hearing before the assigned Magistrate Judge, the Middle School Plan was in its sixth year and eleven (11) out of the seventeen (17) clusters had been implemented. The remaining six (6) clusters were targeted for the 1997-1998 school year. (Stipulation at § 37). Also, during this time period, the school system had nine (9) schools with magnet programs and had plans for five (5) additional magnet programs at other schools.

On June 1, 1994, Plaintiffs filed an Amended Motion to Enforce and Consent Order (Docket No. 439). In their Motion, Plaintiffs complained, for the first time, of the existence of schools where black students constituted at least 40% of the total student population. Plaintiffs alleged that the existence of these schools was a violation of the 1971 desegregation plan adopted by the Court. Plaintiffs also asserted that Defendants had not complied with the 1991 Consent Order, which provided that, in the event Defendants deviated from the student attendance patterns contained in the proposed Middle School Plan, they would "seek to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios." *See* (1991 Consent Order at 6) (citation omitted).

Plaintiffs' Motion pointed out that sixteen (16) schools, out of 149, had black student populations comprising 40% or more of the total student population. The sixteen (16) schools and the percentages of black students in each school, as of the 1995-1996 school year, was as follows: Robles Elementary (90%), Edison Elementary (75%), Sulphur Springs Elementary (74%), Oak Park Elementary (70%), Graham Elementary (67%), Foster Elementary (61%), Cleveland Elementary (57%), Shaw Elementary (56%), Witter Elementary (54%), Cahoon Elementary (52%), Clair Mel Elementary (49%), West Tampa Elementary (47%), DeSoto Elementary (43%), Van Buren Junior High (53%), Sligh Junior High (50%), and Dowdell

Junior High (49%). (DX 7). Each of these sixteen (16) schools were predominately white in 1971. (T1 at 33).

Plaintiffs' Motion to Enforce was referred to the Magistrate Judge for a Report and Recommendation. The assigned Magistrate Judge held an evidentiary hearing and recommended denial of Plaintiffs' Motion for failure to establish a violation of the Court's orders. On November 17, 1995, this Court deferred ruling on the Report and Recommendation, noting that Plaintiffs' Motion focused on student assignment. The Court explained that the issues raised in connection ***1287** with Plaintiffs' Motion to Enforce, "demonstrates the need to expand the scope of the inquiry to a full fledged determination of whether the Hillsborough County school system has in fact achieved unitary status." (Order Recommitting Matter to Magistrate, Docket No. 709 at 3). The Court further emphasized that, "[a]s it stands now, this Court and the parties are attempting to chart a course for the future without the benefit of a sound assessment of where we are currently." *Id.* at 3.

Consequently, the Court ordered:

> [A] showing by Defendants as to whether they have complied with this Court's 1971 Order regarding the factors set forth by the United States Supreme Court in *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968). In addition to student assignments, *Green* and *Freeman* require that faculty and staff assignments, transportation, extracurricular activities, facilities and resource allocation all be free from racial discrimination. In each of these areas, the School Board bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior constitutional violation of plaintiffs' rights. *Freeman*,

> 503 U.S. at 494[, 112 S. Ct. 1430]. The quality of education being received by all students and the good faith commitment by the School Board must be shown.

Id. at 4.

Following the referral Order, the assigned Magistrate Judge set a hearing on the unitary status determination and thereafter, conducted monthly status conferences with counsel for the parties. The parties exchanged discovery and retained expert witnesses. After the evidentiary hearing was concluded, the parties filed proposed findings of fact and conclusions of law which were supplemented after the filing of the 6th Annual Report to the Consent Order. Closing arguments were presented on May 22, 1997.

On August 26, 1997, the assigned Magistrate Judge issued a Report and Recommendation on the issue of whether the public school system of Hillsborough County has attained unitary status and should be released from court supervision. (Docket No. 809). After a comprehensive analysis of the issue, the assigned Magistrate Judge recommended that this Court find that Defendants have demonstrated that the public school system has attained unitary status. Although this Court agrees with a majority of the Magistrate Judge's analysis, the Court disagrees that school system should be released from supervision at this time.

As a preliminary matter, the Court feels compelled to address the concerns regarding the duration of this litigation and the passage of time since this Court provided Defendants with specific instructions. One theme which Defendants have reiterated continuously throughout this litigation has been that, even when the schools in the county began to deviate from the system-wide race ratios, Plaintiffs, and the Court, failed to challenge this occurrence. However, it is clear that Defendants

have been charged with the affirmative duty to desegregate the public schools in Hillsborough County to the maximum extent practicable. Regardless of the reasons for inaction by Plaintiffs and the Court, Defendants remain obligated to fully and diligently discharge their duties. Although Defendants were entitled to seek release from the Court's supervision at anytime after the desegregation plan was implemented, their obligations remain until this Court ruled otherwise.

A considerable amount of time has passed since the desegregation plan was implemented. Undoubtedly, Defendants' desegregation efforts demonstrate significant success; however, the amount of time Defendants have had to achieve this success detracts from their achievements. Moreover, while Defendants may have seen the delay in the instant rulings as merely an unfortunate reality of an overcrowded Court docket, the Court has viewed this delay as an additional opportunity for Defendants to demonstrate that Court supervision is no longer necessary. Defendants have failed to capture that opportunity.

DISCUSSION

Vacation or Modification

Plaintiffs' first objection concerns the Magistrate Judge's finding that attainment of unitary status constitutes a "changed circumstance" ***1288** warranting vacation of the 1991 Consent Order. The Magistrate Judge explained that modification of a consent order in a desegregation case may be considered when:

> (1) a significant change in facts or law warrants change and the proposed modification is suitably tailored to the change; (2) significant time has passed and the objectives of the original agreement have not been met; (3) continuance is not longer warranted; and/or (4)

> continuance would be inequitable and each side has legitimate interests to be considered.

® & R at 64) (citing *Jacksonville Branch NAACP v. Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir.1992)). Plaintiffs contend that attainment of unitary status cannot amount to a changed circumstance warranting modification or vacation of a consent order. Plaintiffs argue that, in order to disturb a consent order, the change in circumstances must not have been foreseen at the time the agreement was reached. Plaintiffs cite *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992), for the proposition that a significant change in factual conditions cannot be predicated on events actually anticipated at the time of entering of the decree. (Br. in Supp. of Pls.' Obj. to R & R at 12). Plaintiffs argue that, "[t]here is no evidence--nor could defendants present any plausible evidence--that unitary status was an unforeseen circumstance when the parties entered into the 1991 Consent Order." *Id.* (emphasis omitted).

Significantly, the respondents in *Rufo* argued that modification of a consent decree should only be allowed when a change in facts is both unforeseen and unforeseeable. 502 U.S. at 385, 112 S. Ct. 748. The Supreme Court explained that this standard proposed by the respondents would be even less flexible than the *Swift* test,[5] a test rejected by the Supreme Court

---

[5]The *United States v. Swift & Co.*, 286 U.S. 106, 52 S. Ct. 460, 76 L. ED. 2D. 999 (1932), "standard," requiring "[n]othing less than a clear showing of grievous wrong evoked by new and unforseen conditions," has been limited to the particular facts in that case. The *Rufo* Court explained that, while the statement appears to be a hardening of the traditional flexible standard for modification of consent decrees when taken out of context, "the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees." 502 U.S.

as being too rigid to apply in all cases. *Id.* at 380, 385, 112 S. Ct. 748. Consequently, in the case at hand, Plaintiffs are proposing an unsupportable standard. Moreover, Defendants argue that, if the attainment of unitary status cannot serve as a sufficient change in circumstances to warrant dissolution of a consent decree, then no consent decree entered in a desegregation case could ever be dissolved, despite the achievement of the stated goals. Clearly, the consent order was not intended to require judicial supervision indefinitely.

Furthermore, the *Rufo* Court acknowledged a district court's need to be able to modify a decree in desegregation cases; "[b]ecause such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased." 502 U.S. at 380, 112 S. Ct. 748 (noting the upsurge in institutional reform litigation since *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)). Moreover, "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *See Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 247, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991). Accordingly, if the purposes of this desegregation litigation, as incorporated in the 1991 Consent Order, have been fully achieved, then the Order can be modified and/or vacated. *Id.* In the instant case, modification is appropriate.

Interrelated *Green* Factors

Plaintiffs also argue that the Magistrate Judge failed to address the relationships among the many *Green* factors in determining that the school system is unitary. Plaintiffs contend that the grade restructuring plan being implemented, pursuant

---

at 379-380, 112 S. Ct. 748.

to the 1991 Consent Order, is a seven-year plan that should be completed in order to fully evaluate its effectiveness and constitutional compliance. Consequently, Plaintiffs assert modification is inappropriate at this time. (Br. in Supp. of Pls.' Obj. to R & R at 5). Plaintiffs argue that many of the *Green* factors are inextricably linked to the grade restructuring ***1289** plan; therefore, the evaluation of the *Green* factors will depend on the full implementation of the plan and declaration of unitary status should be deferred.

Conversely, Defendants contend that continuation of the 1991 Consent Order is no longer warranted when the school system attains unitary status. Defendants argue that, if the school system is unitary, then the purpose of both the 1971 Order and 1991 Consent Order has been met; therefore, continuing supervision is unnecessary. (Def.'s Resp. to Pls.' Objs. to R & R at 3).

The Court must evaluate the *Green* factors in order to determine whether Defendants have attained unitary status. The interdependence of these factors is typically evaluated when an incremental release of Court supervision is contemplated. Contrary to Plaintiffs' assertion, the Magistrate Judge noted:

> However, if the Court has concerns about whether defendants have desegregated the elementary schools to the maximum extent practicable, continued supervision over student assignment could be retained while relinquishing jurisdiction over the other aspects of school operation as long as remedial action in the other areas is not necessary to achieve unitary status in the area of school assignment.

® & R at 88 n.56). Consequently, the Court will analyze the relationships among the *Green* factors at the appropriate time.

Unitary Status

I. Vestiges of Past Discrimination

Clearly, the attainment of unitary status is the goal of the instant desegregation litigation.[6] "The objective today remains to eliminate from public schools all vestiges of state-imposed segregation." *Swann*, 402 U.S. at 15, 91 S. Ct. 1267.

> The concept of unitariness has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn.

Freeman v. Pitts, 503 U.S. 467, 486, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992).

A. Defendants' Duty

The question is whether Defendants have successfully discharged the duty imposed by the Constitution to eliminate the vestiges of *de jure* segregation. District courts have been directed to assert jurisdiction over school systems which

---

[6]In *Board of Educ. of Oklahoma City Pub. Schools, Independent School Dist. No. 89 v. Dowell*, 498 U.S. 237, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991), the Supreme Court expressed concerns for the inconsistent usage of the term "unitary." *Id.* at 245, 111 S. Ct. 630. The term "unitary" in this Order will be used to identify a school district that has completely remedied all vestiges of past discrimination and has met the mandate of *Brown v. Board of Educ.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. ED. 2D. 1083 (1955). *Id.*

previously practiced *de jure* segregation to ensure compliance with the constitutional mandate of *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. ED. 2D. 873 (1954) ("*Brown I*"). *See Brown v. Board of Educ.*, 349 U.S. 294, 300-01, 75 S. Ct. 753, 99 L. ED. 2D. 1083 (1955) ("*Brown II*"). The courts' jurisdiction is to be exercised until a determination can be made that the vestiges of past discrimination have been eliminated to the maximum extent practicable. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). In order to achieve constitutional compliance, a school district is obligated to comply, in good faith, with the court's desegregation decree and "take whatever [affirmative] steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Bd. of New Kent County*, 391 U.S. 430, 437-39, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968). Significantly, "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979). Consequently, Defendants should be released from judicial supervision only when the Court finds that: (1) Defendants have eliminated the vestiges of past discrimination ***1290** to the maximum extent practicable; and (2) Defendants have exhibited a record of full and satisfactory compliance with the Court's orders. Importantly, Defendants remain subject to the 1971 desegregation Order until this Court declares that the school district has achieved unitary status and has complied with the Court's orders in good faith. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439-40, 96 S. Ct. 2697, 49 L. Ed. 2d 599 (1976).

The School Board's responsibility to eliminate the vestiges of the unconstitutional *de jure* system "is required in order to ensure that the principal wrong of the de jure system, the injuries and stigma inflicted upon the race disfavored by the

violation, is no longer present." *Freeman v. Pitts*, 503 U.S. 467, 485, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992) . However, "a remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Id.* at 489, 112 S. Ct. 1430; *Swann*, 402 U.S. at 16, 91 S. Ct. 1267 (explaining that judicial powers may be exercised only on the basis of a constitutional violation). The purpose of the remedial action is to eliminate the vestiges of state-compelled dual systems, not to remedy racial imbalances unrelated to *de jure* segregation. *Id.* at 494, 112 S. Ct. 1430. Nevertheless, if Defendants have not discharged their affirmative constitutional duty to dismantle the dual school system, the school district remains in violation of the Fourteenth Amendment.

(i) *Racially Identifiable*

In terms of describing the alleged shortcomings of Defendants' desegregation efforts, Plaintiffs assert that Defendants do not have a working definition of a desegregated school. The concept of "racial identifiability" is generally used to describe the relationship between the racial composition of a particular school and the racial composition of the system as a whole. The Supreme Court's decision in *Green* requires school boards to prove that racially identifiable schools are not the consequence of past or present discriminatory state action. Throughout this litigation, the parties have been unable to agree on a definition of a racially identifiable school. Nevertheless, Plaintiffs suggest a definition of a racially identifiable school as: a school having a population of black students of forty-percent (40%) or more.

Defendants argue that a working definition of a desegregated school is not required in order to determine whether unitary status has been achieved. Defendants emphasize that the Court provided numerical goals for the Defendants to consider as it aimed at desegregating schools.

However, a particular percentage has not been used as a line of demarcation. For example, in the 1971 Order, the Court directed Defendants to concentrate on all schools in the county having at least a 50% black population. The Court further suggested that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation. 1971 Order at 43-44. Notwithstanding, Defendants stress that none of the Court's Orders have expressly or implicitly directed Defendants to maintain a particular student race ratio at any school, or to take any action in response to increased black enrollments in the schools.[7]

In the 1971 Order, the Court explained that the Hillsborough County school system was a segregated system. "As of October 24, 1969, 74% of the county's white students were in 70 white schools, whereas 65% of the black students were concentrated in 21 black schools." (1971 Order at 35). Moreover, the Court explained that, as of October 23, 1970, 46% of the school system's blacks were attending 15 black schools. "Although they comprised only 19% of the student population, 13,606, or 69%, were in 28 schools at ***1291** least 50% black. On the other hand, 69% of the white students--57,869 out of 83,474--attended 65 schools either all white or at least 95% white." *Id.*

---

[7]Defendants' position is not entirely accurate. As discussed above, in 1974, the Court directed Defendants' attention to the schools with increasing black enrollments and ordered Defendants to submit a supplemental desegregation plan. Moreover, the 1991 Consent Order provided that any "modifications" in student assignment patterns resulting from demographic or other changes must be made with an eye towards minimizing, to the extent practicable, the number of schools which deviate from the system-wide student enrollment ratios. *See* (1991 Consent Order at 6).

After the Court entered the 1971 Order, 97% of Hillsborough County elementary school students attended racially balanced schools, according to Plaintiffs.[8] In comparison, Plaintiffs argue, only 69% of Hillsborough County elementary school students attended racially balanced schools in 1995. Moreover, Plaintiffs point out that, for all but two (2) years between 1971 and 1988, 90% of junior high school students attended racially balanced schools; however, as of 1995, the percentage has dropped to 75%.[9]

The Constitution does not require that every school in every community must always reflect the racial composition of the school system as a whole. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). The Courts have consistently warned against the application of an inflexible standard of having "no majority of any minority" in a school.

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in absence of a showing that

---

[8]Plaintiffs have used Dr. Shelley's definition of "racially unbalanced" schools, which includes schools with an African-American population 40% or above.

[9]Although Plaintiffs' statistics are significant, it should be noted that the October 1969, figures reflect the percentages of *white* and *black* students, whereas, Plaintiffs' figures represent the entire student population.

> either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Id. at 31-32, 91 S. Ct. 1267. Accordingly, it is clear that Defendants had no continuing duty to maintain a particular black to white student ratio on a school-by-school basis over the expansive time period of this litigation, including the 80%/20% ideal set forth in the 1971 Order. *See id.* at 24, 91 S. Ct. 1267 (disapproving an approach to desegregate schools which requires, as a matter of constitutional right, any particular degree of racial balance or mixing).

Nevertheless, the district-wide ratios are an important starting point to analyze Defendants' fulfillment of its obligations. "In most cases where the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole." *Freeman*, 503 U.S. at 474, 112 S. Ct. 1430. Moreover, although schools which have become virtually all one-race "require close scrutiny," they are not *per se* unconstitutional. *Swann*, 402 U.S. at 26, 91 S. Ct. 1267. However, their existence in a school system with a history of *de jure* segregation, establishes a presumption that they exist as a result of discrimination and the burden of proof shifts to the School Board. *Id.* "The school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation." *Freeman*, 503 U.S. at 494, 112 S. Ct. 1430.

The Court finds that Plaintiffs' definition of a racially identifiable school is useful and fair. A school that has 20%

more black students than that of the district-wide composition indicates that the school has deviated significantly from the system-wide norm. While the phrase "racially identifiable" is useful as a descriptive term, it should not be accorded more weight than it deserves.[10] A school system can have racially identifiable schools and still be a unitary school system. Moreover, if the racial identifiability is unrelated to *de jure* segregation, a court imposed remedy is not justified. However, the fact ***1292** that a school deviates from the system-wide ratio should, at least, cause some concern and an evaluation by the School Board (the authority charged with the responsibility to desegregate the schools to the maximum extent possible), must ensue.[11] In other words, while racial identifiability of a school is relevant, it does not define the standard for determining whether the School Board has discharged its affirmative duty or has achieved unitary status.

(ii) *Demographics*

Plaintiffs challenge the Magistrate Judge's evaluation of Defendants' evidence concerning the change in demographics in Hillsborough County. Plaintiffs argue that, not only is the change in demographics in Hillsborough County far less

---

[10]The Court will use the phrases "racially identifiable" and "racially imbalanced" or "racially unbalanced" interchangeably to generically represent schools which are a source of concern.

[11]The Supreme Court has emphasized that, "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools." *Swann*, 402 U.S. at 26, 91 S. Ct. 1267.

dramatic and more incremental than in Freeman, but the identification of pure demographic change is further complicated by the implementation of a Middle School Plan.[12] (Br. in Supp. of Pls.' Obj. to R & R at 15). Plaintiffs maintain that the Middle School Plan requires considerable change and that the statistical information on the precise demographic effect will not be discernible until the 2000 census is available. Moreover, Plaintiffs argue that Defendants have acted, or failed to act, in a number of ways which has contributed to the racial identifiability of the Hillsborough County schools. Plaintiffs assert that the issue is whether Defendants bear any responsibility for the racial identifiability and, if so, the extent to which Defendants are responsible.

As noted above, there are sixteen (16) schools which have become focal points for determining whether or not the school system is unitary.[13] The percentages of black students in each of these sixteen (16) schools, as of the 1972-73 school year, were as follows: Robles Elementary (24%), Edison Elementary (36%), Sulphur Springs Elementary (19%), Oak Park Elementary (23%), Graham Elementary (35%), Foster Elementary (21%), Cleveland Elementary (26%), Shaw Elementary (15%), Witter Elementary (18%), Cahoon Elementary (21%), Clair Mel Elementary (18%), West Tampa Elementary (14%), DeSoto Elementary (35%), Van Buren Junior High (17%), Sligh Junior High (20%), and Dowdell

---

[12]In *Freeman*, the subject school system had 5.6% black students in 1969 and 47% black students by 1986. 503 U.S. at 475, 112 S. Ct. 1430. In the case at hand, the increase in black students ages 0 to 17 has only been from 17.4% in 1970, to 19.4% in 1990.

[13]The 16 schools represent the degree of racial imbalance in the school district, i.e., approximately 10% of the schools are racially identifiable. Notwithstanding, there are additional schools which are a source of concern, as discussed below.

Junior High (14%). (DX 7). In 1970, the total population in Hillsborough County was 490,265, of which, 422,119 were white and 66,648 (13.5%) were black. (DX 2 Table 1). During the same year, the total population between the ages of 0 to 17 years old was 164,278, of which, 135,344 were white, and 28,527 (17.4%) were black.[14]

However, the latest figures used in this litigation reflect the following percentages of black students attending the sixteen (16) schools, as of the 1995-1996 school year: Robles Elementary (90%), Edison Elementary (75%), Sulphur Springs Elementary (74%), Oak Park Elementary (70%), Graham Elementary (67%), Foster Elementary (61%), Cleveland Elementary (57%), Shaw Elementary (56%), Witter Elementary (54%), Cahoon Elementary (52%), Clair Mel Elementary (49%), West Tampa Elementary (47%), DeSoto Elementary (43%), Van Buren Junior High (53%), Sligh Junior High (50%), and Dowdell Junior High (49%). (DX 7). In 1990, the total population in Hillsborough County was 834,054, of which, 690, 352 were white and 110,283 (13.2%) were black. (DX 2 Table 1). During the same year, the total population between the ages of 0 to 17 years old was 202,274, of which, 152,900 were white, and 39,163 (19.4%) were black.[15]

***1293** Plaintiffs assert that, since 1971, there has been relatively little change in the racial composition of the Hillsborough County School District as a whole and by grade level, except at the high school level. (Pls. Proposed Findings of Fact and Conclusions of Law at 12). Plaintiffs contend that, while most schools in Hillsborough County reflect the district-

---

[14]Less than 1% were classified as nonwhites.

[15]Approximately 5% of the "school-age" population was classified as nonwhites.

wide student racial composition, the schools with 40% or more black student populations should be considered racially identifiable because they are approximately 20 percentage points above the system-wide ratio. *Id.* Moreover, Plaintiffs point out that, the majority of these schools are 30 percentage points or more above the district-wide black student racial composition. *Id.*

Conversely, Defendants argue that the increase in the number of schools with a majority black student population is the result of residential patterns and not the product of discrimination by the School Board. Moreover, Defendants argue that Plaintiffs' insistence on the elimination of racially identifiable schools seeks to impose an obligation on Defendants which is not mandated by governing law. Defendants emphasize that the Court may only order the elimination of racially imbalanced schools when the racial imbalance was caused by an unlawful *de jure* policy of the school district.

Defendants' recitation of the law is correct. "Racial balance is not to be achieved for its own sake." *Freeman*, 503 U.S. at 494, 112 S. Ct. 1430. In *Freeman*, Supreme Court evaluated a district court's role in supervising a school system where demographics are the cause of racial imbalances and stated:

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated.

Freeman, 503 U.S. at 495, 112 S. Ct. 1430. Accordingly, in the case at hand, the issue is whether the racial imbalances in the school district have a causal link to the *de jure* violation being remedied.

The Court is not convinced that a shift in demographics and residential patterns explains the racial imbalance in the Hillsborough County School system. Defendants have failed to adequately discharge their affirmative duty to eliminate the dual system "root and branch." While the Court finds that the racial imbalances in the schools are not the result of a deliberate attempt by Defendants to fix or alter demographic patterns to affect the racial composition of the schools, Defendants' apathy over the years demonstrates a lack of good faith compliance.[16] Moreover, because Defendants failed to fully discharge their affirmative duty to desegregate the school system, the district has not been desegregated to the maximum extent practicable. Defendants have failed to prove that the racial imbalances are not traceable, in a proximate way, to the past *de jure* segregation.

B. Student Assignments

All of the schools in Hillsborough County were

---

[16]After Defendants filed their 1974 Annual Report, which indicated that four (4) schools had become 40% black and one (1) school had become 50% black, the Court directed Defendants to file a supplemental plan designed to insure that "the requirements of the Court's previous orders insofar as they relate to Lee Elementary School[, which had become 50% black,] will be complied with as of the beginning of the 1975-76 school year." Order of January 14, 1975. In the same order, the Court directed the Defendants' attention to the other schools which had become 40% black. *Id.* Notably, this Court was expressing its concerns to Defendants only three (3) school years after implementation of the desegregation plan.

desegregated as of the 1971- 1972 school year. Furthermore, each of the sixteen (16) schools, which are currently considered racially imbalanced, was predominately white following the 1971 desegregation Order. (T1 at 33). Since that time, the School Board has implemented numerous attendance changes which altered the racial composition of the schools district-wide. However, these sixteen (16) schools have increased their black student populations relatively quickly after the 1972-1973 school year and their enrollments have become disproportionate to the system-wide race ratios. Although ***1294** Defendants used projected attendance figures to calculate the expected improvements to the race ratios of the schools, the Court will focus on the actual changes to evaluate the cause of the racial imbalance in the sixteen (16) schools.

(i) *Attendance Zone Adjustments*

Robles Elementary

The first boundary changes made to Robles' attendance zone took place during the 1976-1977 school year. The boundary change which affected first through fifth graders included transferring fifty-three (53) black and seventeen (17) white students from Robles Elementary to Browards Elementary. In addition, eight (8) black and three (3) white sixth graders were transferred to Potter Elementary. The actual racial composition of students in attendance for the 1975-1976 school year was 33% black and 67% white, whereas after the change was made, the actual racial composition of students in attendance for the 1976-1977 school year was 30% black and 70% white. Significantly, no other boundary changes were implemented that would have affected Robles' attendance zone. The actual racial composition of Robles for the 1995-1996 school year was 90% black and 10% white.

Cleveland Elementary

Defendants changed Cleveland's attendance area for the 1972-1973 school year to encompass a portion of Potter Elementary's attendance zone and the parameters of the attendance area were redrawn. The actual composition of students in attendance for the 1972-1973 school year was 26% black and 74% white. For the 1975-1976 school year, Defendants made boundary changes which affected first through fifth graders by adjusting the parameters of the attendance zone. All sixth grade students were moved to the Potter attendance zone. The actual racial composition of students in attendance for the 1974- 1975 school year was 46% black and 54% white, whereas after the changes were made, the actual racial composition of students in attendance for the 1975-1976 school year was 44% black and 56% white. For the 1989-1990 school year, 12 black and 12 white students were reassigned from Sulphur Springs Elementary to Cleveland and the parameters of Cleveland's attendance zone were readjusted. The actual racial composition of students in attendance for the 1988-1989 school year was 61% black and 39% white, whereas after the changes were made, the actual racial composition of students in attendance for the 1989-1990 school year was 53% black and 47% white. No other boundary changes were implemented that would have affected Cleveland's attendance zone. The actual racial composition of Cleveland for the 1995-1996 school year was 57% black and 43% white.

Edison Elementary

The actual racial composition of students in attendance for the 1972-1973 school year was 36% black and 64% white. The first boundary change affecting Edison's attendance zone was implemented for the 1982-1983 school year. Twenty-one (21) white and ninety-four (94) black students were transferred from Edison to Claywell Elementary. The actual racial

composition of students in attendance for the 1981-1982 school year was 55% black and 45% white, whereas after the change was made, the actual racial composition of students in attendance for the 1982-1983 school year was 50% black and 50% white. No other boundary changes were implemented that would have affected Edison's attendance zone. The actual racial composition of the students in attendance for the 1995-1996 school year was 75% black and 25% white.

Graham Elementary

The actual racial composition of the students in attendance for the 1972-1973 school year was 35% black and 65% white. The first boundary change affecting Graham's attendance zone was implemented for the 1988-1989 school year. Graham received thirteen (13) black first through sixth graders from the Gorrie satellite, pursuant to a student assignment change. The actual racial composition of students in attendance for the 1987-1988 school year was 63% black and 37% white, whereas after the change was made, the actual racial composition of the students in attendance for the 1988-1989 school year was 64% black and 36% white. No other boundary changes were implemented that would have affected Graham's attendance ***1295** zone. The actual racial composition of the students in attendance for the 1995-1996 school year was 67% black and 33% white.

Oak Park Elementary

The actual racial composition of the students in attendance for the 1972-1973 school year was 23% black and 77% white. The first boundary change affecting Oak Park's attendance zone was implemented for the 1979-1980 school year. During the 1979-1980 school year, there was a satellite transfer made from Oak Park to DeSoto Elementary and there was a satellite transfer from Gary to Oak Park Elementary.

These satellite transfers were implemented in order to close Gary Elementary. The actual racial composition of students in attendance for the 1978-1979 school year was 46% black and 54% white, whereas after the change was made, the actual racial composition of the students in attendance for the 1979-1980 school year was 41% black and 59% white. During the 1996-1997 school year, one (1) white and ten (10) black first through fifth graders were transferred from Oak Park to Alafia Elementary School as the result of a needed cluster adjustment. The actual racial composition of the students in attendance for the 1996-1997 school year was not available when Defendants submitted their materials. The actual racial composition of the students in attendance for the 1995-1996 school year was 70% black and 30% white.

Defendants do not dispute the fact that no boundary changes were specifically made to reduce the racial imbalance. Instead, Defendants attribute the increase in the black student populations at the sixteen (16) schools to demographic changes in attendance zones and contend that, as a result, no changes were required. For example, Defendants argue that the percentage of black school-age children living in the Robles attendance zone increased from 13% in 1970 to 31.3% in 1980.[17] Defendants argue that the Robles attendance zone subsequently experienced a drastic increase in the percentage of black school-age children from 31.3% in 1980 to 71.4% in 1990. Census data is unavailable for changes occurring after 1990. Notwithstanding, Defendants assert that when they have made changes to the attendance patterns for reasons other than race, the racial composition of the schools was a paramount consideration.

---

[17]The phrase "school-age children" includes children 0 to 17 years old.

Conversely, Plaintiffs maintain that there has been relatively little change in the racial composition of the Hillsborough County school district as a whole since 1971. Plaintiffs argue that during the period when the number of racially identifiable schools increased, Defendants opened and closed schools which created new attendance zones. Plaintiffs contend that, when the initial decisions were made, for example, to construct a new school, the principal concern should have been desegregation; the problems of overcrowding could have been adjusted accordingly. Plaintiffs argue that Defendants' obligations include, *inter alia,* considering the construction and abandonment of school facilities, and drawing attendance zones so as to affirmatively promote desegregation of the school system. Plaintiffs argue that mere neutrality is not an option.

In addition, Plaintiffs assert that over the course of this litigation, Defendants altered existing attendance zones and redeployed inner-city satellite zones from school to school. Consequently, Plaintiffs argue, Defendants were provided with an opportunity to address existing racial identifiability in the school system; however, Defendants failed to take advantage of those opportunities. Furthermore, Plaintiffs emphasize that the attendance zones were changed infrequently for the schools which are now racially identifiable; therefore, Defendants' failure to act has contributed to this racial imbalance in the schools. Moreover, Plaintiffs argue that, other techniques used to improve the racial compositions at schools in Hillsborough County, such as the assignment and reassignment of satellite zones, were not used to reduce the percentages of black students at schools such as Robles. As a result, Plaintiffs assert that this Court must determine whether Defendants have been affirmatively seeking to integrate the Hillsborough County school system with respect to all of the factors outlined in *Green*, from 1971 until the present.

***1296** Undoubtedly, Defendants have been effective in desegregating the Hillsborough County school system. Hillsborough County is the 12th largest school district in the country. For the 1996-1997 school year, the county consisted of 149 public schools. Defendants point out that a majority of the schools have remained within a plus or minus 10% variance from the 80/20 race ratio suggested as ideal by the Court in 1971.[18] *See* 6th Annual Report at 42. Moreover, Defendants argue that, although the modifications have been made for reasons other than race, Defendants had no obligation to improve racial balances if the imbalances were not caused by either prior or present action of the School Board.

Defendants assert that, upon implementing their desegregation plan, none of the schools in Hillsborough County had a black majority population for the 1971-1972 school year.[19] Defendants point out that, although a few elementary schools began to increase their black population in the following years, the School Board implemented a supplemental plan with the Court's approval.[20] By the end of 1974, no

---

[18]The 6th Annual Report submitted by Defendants provides the following statistics for the 1996-1997 school term: 18 schools had lower than 10% black student population; 30 schools had between 10-15% black student population; 46 schools had between 16-24% black student population; 18 schools had between 25-30% black student population; 14 schools had between 30-39% black student population; 9 schools had between 40-49% black student population; 14 schools had 50% or higher black student population.

[19]As of October 27, 1971, there were no majority black schools among the 122 schools in the district and only one (1) school had more than a 40% black student population. (DX 7).

[20]It should be noted that the supplemental plan was developed at the Court's insistence.

schools had a black majority population.[21] Defendants argue that, from that point forward, the School Board has endeavored to maintain a desegregated school system in Hillsborough County. Defendants argue that, Plaintiffs' demand that: "all racially identifiable schools be eliminated," is contrary to the mandates of the Constitution. Defendants argue that they are not required to maintain a specific ratio at each school in the County.

Defendants admit that the schools which are now majority black schools and which are the focus of the Plaintiffs' Motion to Enforce Order, have steadily increased their black population over the course of this litigation; however, Defendants attribute this increase to the change in demographics, rather than, any action or inaction by the School Board.[22] Consequently, Defendants argue that they were not required to take affirmative action. Defendants contend that the only issue is whether the racial imbalances are traceable to the prior violation.

Defendants' Expert

During the 1996 unitary status hearing, Defendants' expert, Dr. Clark, testified about the differences in growth rates between the black and white populations of children 0 to 17 years old. Dr. Clark noted that, between 1970 and 1980, the white 0 to 17 population grew by under 3% while the black 0 to

---

[21]The 1975 Annual Report reflects that five (5) schools out of 128 had student populations which were in excess of 40% black. However, by the 1975-76 school year, one (1) school, Cleveland Elementary, had become a black majority school at 55%.

[22]Using Robles Elementary as an example, the school was 43% black in 1979-80; 75% black in 1984-85; 80% black in 1986-87; 85% black in 1990-91; and 90% black in 1993. *See* (DX 7).

17 population grew by almost 16%, five times as fast. (T2 at 20). From 1980 to 1990, the growth of the black population was almost twice as fast as the growth of the white population. *Id.* Dr. Clark explained that the growth in both segments of the population, as a whole, makes it possible to keep racial balance within a reasonable boundary. *Id.* However, according to Dr. Clark, the differential growth rate of the black 0 to 17 population indicates that the black school-age population was increasing proportionately faster, making it more difficult to keep the schools racially balanced. *Id.* at 21.

Significantly, Dr. Clark testified that changes in the populations did not occur uniformly across the county. Dr. Clark explained that Hillsborough County experienced a significant loss of white population ***1297** and a significant gain of black population in the inner-city area. *Id.* at 25. Therefore, according to Dr. Clark, any schools within the inner-city areas that are neighborhood schools, will reflect racial compositions similar to that of the composition of the inner-city areas. Dr. Clark testified that in 1970, there were about six (6) or seven (7) census tracts that had a 95% black 0 to 17 age population, whereas, in 1990, there were only three (3) census tracts with a 95% black 0 to 17 age population. *Id.* at 33. Nevertheless, Dr. Clark emphasized that the tracts with a 50% black 0 to 17 age population increased by about 40% between 1970 and 1990. *Id.* at 33-34.

Dr. Clark testified that, the shifts in the inner-city populations made it very difficult to adjust attendance boundaries to maintain a student body composition within a plus or minus 20% range of the district-wide ratios. *Id.* at 35. Dr. Clark explained that, as the areas with a 50% black 0 to 17 age population expand, as it has done in the inner-city of Hillsborough County, each school within those areas is impacted. *Id.* According to Dr. Clark, as the School Board attempts to make adjustments to the schools within the areas

with a 50% or greater black population, and because these areas have expanded to encompass many different school attendance zones, each adjustment makes it increasingly difficult for the School Board to make additional adjustments that will effectively improve the race ratios in the other schools in those areas. *Id.* Defendants' Exhibit 8 geographically depicts the attendance zones of the racially imbalanced schools and clearly demonstrates that the schools which have become racially identifiable are located in the same vicinity as other schools with high black enrollments. Although there are additional adjustments which can be made to improve racial balance, the improvement would be at the expense of neighboring schools which are on the verge of becoming racially identifiable.

Dr. Clark analyzed fourteen (14) of the sixteen (16) schools which are racially imbalanced and grouped Robles, Cleveland, Edison, Oak Park, and Graham together because these schools became at least 40% black between 1970 and 1980. (Tr 2 at 36). The remaining schools were grouped because those schools deviated from the plus or minus 20% range between 1980 and 1990.

In 1970, the Robles attendance zone was comprised of 2,247 children between the ages of 0 to 17. (DX 2 Table 4). Only 292(13%) of those children were black. *Id.* In 1980, the Robles attendance zone was comprised of 2,496 children between the ages of 0 to 17. *Id.* During this time, 781 (31.3%) of those children were black. *Id.* Significantly, by 1990, the Robles attendance zone was comprised of 2,875 children between the ages of 0 to 17, by this time, 2054 (71.4%) of those children were black. *Id.* Dr. Clark emphasized that, while the total population of an area was not experiencing dramatic increases, the black population of school-aged children was increasing dramatically. Dr. Clark also pointed out that the satellite zone originally assigned to Robles was only 0 to 5% black school-aged children. However, in 1990, the satellite

area, although no longer maintained, was almost entirely 75-95% black school-aged children and would have further increased the proportion of black students enrolled at Robles if it had not been removed. (T2 at 46); (DX 2 Table 4; Figure 10).

In 1970, Cleveland's attendance zone was comprised of 1,657 children ages 0 to 17. (DX 2 Table 4). During this time, only 46 (2.8%) of these school-aged children were black. *Id.* In 1980, the number of school-aged children in the attendance zone decreased to 1,544; however, by this time, 639 (41.3%) of the school-aged children were black. *Id.* In 1990, the number of school-aged children in Cleveland's attendance zone increased slightly to 1,578, and the black school-aged population increased to 654 (41.4%). *Id.* Dr. Clark explained that in 1970, there were a few blocks with in Cleveland's attendance zone that were between 0 and 5% and a few blocks that were comprised of between 5 and 25% black school-aged children. (Tr 2 at 40). By 1980, the black school-aged population was still concentrated in the same few blocks; however, by this time, those blocks were comprised of between 75 to 95% black school- aged children. *Id.* at 41. In 1990, those few blocks were not as concentrated with a black school-
***1298** aged population; however, the population spread out through a large number of blocks which were primarily 50 to 75% black 0 to 17 year old children. Moreover, black school-aged children made up of 95 to 100% of some of the neighborhood blocks closest to the school. *Id.*; (DX2 Figure 6).

Dr. Clark's testimony and report on the Demographic Change and School District Impacts in Hillsborough County (DX 2) highlights the changes in the attendance zones for the racially imbalanced schools. Dr. Clark described the increases in the black school-aged children in the attendance zones and concluded that the shift in the residential patterns in the inner-city of Hillsborough County accounts for the racial imbalances

in these schools. Notwithstanding, the Court is compelled to question the reliability of Dr. Clark's statistics.

There are significant problems with the statistics used to explain the racial imbalances in the sixteen (16) schools under consideration. Defendants' statistics encompass a larger segment of the population than is useful to explain the deviations in the racial compositions of the unbalanced schools. Specifically, Defendants rely on Dr. Clark's use of school-aged children from ages 0-17 to explain enrollment ratios at the elementary schools; however, almost one-half of the children included in this group would not, in fact, be attending an elementary school.[23] Moreover, while a few blocks in an attendance zone may reflect black school-age populations as high as 95%, those few blocks only represent a small proportion of the entire attendance zone. Finally, Dr. Clark's analysis does not address Defendants' initial decisions to draw attendance zones, decisions not to act when it was apparent that those zones were inappropriate, or other School Board decisions, such as, location of new schools, or implementation (or lack thereof) of desegregation tools.

(ii) *Inflated Statistics*

The sweeping nature of Defendants' statistics is of particular concern. Dr. Clark's testimony placed great emphasis on the increase in the percentage of neighborhood blocks which were comprised of a high concentration of black school-aged children within each of the schools' attendance zones.

---

[23]The Court acknowledges that more precise figures were not available; however, the fact that the 0 to 17 age group logically encompasses children too young and too old to attend elementary schools, counsels against placing great weight on the use of these statistics.

However, these statistics alone fail to adequately explain the racial compositions in these schools. For example, if the attendance zone is made up of fifty (50) neighborhood blocks, and three (3) of those blocks are 95 to 100% black, this still represents a small number of black students within the attendance zone. Moreover, while a certain block may have been as high as 100% black, that block may have only had four (4) school-aged children living on that block. To intensify the problem, three (3) of those children may have been high school, rather than, elementary school-aged children. While the shortcomings of Defendants statistics do not evidence deliberate discriminatory action, Defendants "bear[ ] the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation." *Freeman*, 503 U.S. at 494, 112 S. Ct. 1430. Therefore, even though Defendants' statistics may look significant at first glance, the Court is concerned about the reliability of those numbers.

A very real example is Dr. Clark's testimony regarding Cleveland Elementary. Dr. Clark pointed out that, in 1970, a few blocks in the attendance zone were comprised of between 5 and 25% black students aged 0 to 17. The black enrollment at Cleveland was around 20% in 1971. Significantly, over the next couple of years, Cleveland's black enrollment soared up to 40% and then, after a few more years, to 60%. (T2 at 40); (DX 2 Figure 6). Dr. Clark testified that, in 1970, there were a few blocks in Cleveland's attendance zone which were between 0 and 5% black and a few blocks which were between 5 and 25% black. To explain the correlation between the black populations in these neighborhood blocks and the black enrollment at Cleveland Elementary, Dr. Clark testified that, "[s]o that's–we would expect, then, that--if those children are going to the school there, we would expect the school to be somewhat in that range, and indeed it is. That's about what the percentage of black ***1299** enrollment is, and we're seeing it in the school." (T2 at 41). In other words, Dr. Clark concluded that, because

there were a few neighborhood blocks in Cleveland's attendance zone that were as concentrated as 25% black, it explains why the black enrollment at Cleveland Elementary was around 20% in 1971 and then continued to climb as the concentration in the blocks increased. Interestingly, the *entire* attendance zone was comprised of only 46 (2.8%) black school-aged children during this time.

A cursory inspection of Dr. Clark's graphical representation of these figures, reveals that these blocks with a high concentration of black school-aged students, represent a small portion of the entire attendance zone.[24] *See* (DX2 Figure 6). Moreover, Dr. Clark qualified his answer by saying, "if those children are going to the school there." However, in all likelihood, there would be several children who are outside of the *elementary school* age group; therefore, they would not, in fact, be attending that school. The fact that a small portion of

---

[24]While there has been no representation that the graphical representations have been drawn to scale, the numbers behind the graphics produce the same conclusion. For instance, Defendant's Exhibit 2, Figure 6, graphically represents that there are a few blocks within Cleveland's attendance zone that are comprised of between 5 to 25% black school-aged children. However, in sheer numbers, there were only 46 (2.8%) black school-aged children, out of 1,657 school-aged children, in Cleveland's entire attendance zone. Of course, some of those children were not attending the elementary school because the data encompasses 0 to 17 year olds. Although Dr. Clark testified that the 20% black population at Cleveland during the 1971-1972 school year was expected, it would appear that a 2.8% black student population would have been more fitting. Moreover, the fact that statistics have not been provided regarding the concentration of white school-aged children in the neighborhood blocks within an attendance zone, to compare to the concentration of black school- aged children, creates additional doubt as to the reliability of Defendants' statistical arguments.

the attendance zone has a high percentage of minority school-aged children does not explain why the *total black enrollment* of those elementary schools correlates to those few blocks with high percentages of minorities; especially since a percentage of those children in the attendance zone would not be attending the school in question.[25] Furthermore, it should have been quite easy for Defendants to make adjustments to combat the sudden increases in minority enrollment if the increases resulted from a few concentrated blocks within the attendance area.[26]

Granted, in 1990, the percentage of black school-aged children in Cleveland's attendance zone had increased dramatically and the number of blocks with a majority of black school-aged children has increased; however, the same deficiencies are present in Dr. Clark's analysis and twenty (20) years had passed since Defendants received the directive to desegregate the Hillsborough County school system. These findings weigh heavily against Defendants' assertion that they responded affirmatively to the Court's desegregation mandates.

---

[25]The Court is constrained to interpret Defendants' data to represent small percentages of the attendance zones in question. Because there are no statistics available to the Court which denote the number of children represented by these neighborhood blocks or the number of *elementary*-aged school children within each elementary school attendance zone, it is difficult to accurately speak in terms of small or large percentages of these attendance zones.

[26]The key question is whether Defendants were required to take steps to combat those increases after a racially neutral system of student assignment had been established. While the failure to make additional adjustments may not evidence deliberate racial discrimination, Defendants' failure to take "whatever steps necessary" is relevant to Defendants' good faith compliance, which will be discussed below.

The racial composition at Robles is also illustrative of the deficiencies in Dr. Clark's explanation. For instance, in 1970, Robles' entire attendance zone was comprised of 2,247 children ages 0 to 17. During this time, only 292(13%) of these 0 to 17 year old children were black. However, the black enrollment at Robles Elementary in the early 1970's rose from around 20% to 30%. In 1980, the number of school-aged children in the attendance zone increased to 2,496. By this time, 781 (31.3%) of the school-aged children were black. However, black enrollment at Robles in the early 1980's was between 50 and 60%, and climbing. In 1990, the number of school-aged children in Robles' attendance zone increased to 2,875, and the black school- ***1300** aged population increased to 2054 (71.4%). However, black enrollment at Robles was over 80% black in 1990 and was approaching 90%.

Certainly, the significant increase in black school-aged children residing in Robles' attendance zone over the course of this litigation explains why the black enrollment in that school continued to increase. However, even if the Court were able to ignore the deficiencies in Dr. Clark's statistics which he used to explain the increase in black students at the elementary school level, the abiding question is: why wasn't the attendance zone adjusted, at least, initially?[27] Although Dr. Clark testified that various neighborhood blocks within the attendance zone had high percentages of black school-aged students, Defendants have not provided the Court with information on how many of those students actually attended elementary school. Significantly, in 1980, black school-aged students comprised only 31.3% of Robles' *entire* attendance zone; however, the *actual* enrollment at Robles during the 1980-1981 school year

---

[27]By 1975 five (5) schools out of 128 had black enrollments of 40% or more: Cleveland, Edison, Gary, Graham, and Palm River Elementary.

was 51% black. Notably, Defendants took no affirmative steps to address the fact that Robles had now crossed the 50% mark and no longer reflected the ideal composition suggested by the Court. Especially since the *entire* attendance zone was only 31.3% black and the *elementary school* was already 51% black.

Plaintiffs' Expert

Plaintiffs' expert, Dr. Shelley, studied the disparities between the percentage of black children 0 to 17 years old and the actual black enrollment in the five (5) schools which became racially unbalanced in the 1970s. Dr. Shelley subtracted the percentage of black children 0 to 17 years old living in a particular attendance zone from the percentage of black children actually attending the elementary school in that zone. (T4 at 51). For example, in 1970 Cleveland Elementary's attendance zone was comprised of 2.8% black children, but the actual attendance at Cleveland for the 1971-1972 school year was 18% black. Thus, Dr. Shelley testified that the difference between these two percentages represents a disparity of approximately 15%. During the 1971- 1972 school year, the disparities were as follows: Cleveland (15%), Edison (17%) Graham (10%), Oak Park (15%), and Robles (12%). In 1980, the disparities among these same schools were as follows: Cleveland (24%), Edison (14%) Graham (17%), Oak Park (4%), and Robles (20%). Finally, the disparities in 1990 were: Cleveland (13%), Edison (-2%) Graham (28%), Oak Park (4%), and Robles (14%). (PX2 Table 5).

Dr. Shelley testified that if natural demographic change was the cause of the racial imbalance in these schools, it would be reasonable to expect that the disparities would be consistent at these schools. (T4 at 53). In other words, if the natural demographic changes were the only cause of imbalance in these schools, the amount that the *actual* attendance of black students exceeds the *total* number of black children in each attendance

zone would be fairly consistent from one school to another. *Id.* at 56. Dr. Shelley explained that if demographic change is the cause of these imbalances, then "there is no reason to believe that the demographic factors such as birth rates are likely to differ substantially from one attendance area to another." *Id.* at 57. Moreover, Dr. Shelley noted, "[w]ithout evidence that there's a substantial disparity between these school attendance areas in terms of things like birth rates, we would expect there to be a consistent pattern of difference between the school attendance areas among these identifiable schools." *Id.*

Dr. Shelley testified that the degree of disparity during the 1971-1972 school year was relatively small. *Id* at 58. The range was from Graham with 10% to Edison with 17%. Dr. Shelley explained that this 7% difference was the degree of consistency that he expected, because it should have been, and remained, consistently small. *Id.* Notably, this was only one (1) year after the desegregation Order was issued, and, undoubtedly, the best year, in terms of desegregation, for the Hillsborough County school ***1301** system with regards to student assignments. However, by 1980, the disparity increased to a range of 4% (Oak Park) to 24% (Cleveland). *Id.* By 1990, the disparity increased from -2% (Edison) to 28% (Graham). *Id.* Dr. Shelley testified that, unless the rates for births, deaths, migration, and other factors increased dramatically by attendance zone, there should not have been a dramatic increase in these disparities. *Id.* Although Defendants provided evidence that birth rates among African-Americans had increased disproportionately to those of whites, according to Dr. Shelley, the increase should have still produced consistent results among all African-Americans in these attendance zones.

Unfortunately, Defendants have taken the position that they were not required to make any adjustments if the School Board had not caused the racial imbalance. While this may be an appropriate legal argument to advance in unitary status

proceedings in 1996, it appears as though Defendants imprudently incorporated this argument into their policy making since the 1970's. However, a party to a court order or decree must abide by its terms until it is later declared improper or unconstitutional. Defendants have always been charged with the obligation to eliminate the vestiges of past discrimination to the maximum extent practicable. *See Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 37, 91 S. Ct. 1289, 28 L. Ed. 2d 577 (1971) ("Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.") (emphasis added); *Green v. County School Bd. of New Kent Co.*, 391 U.S. 430, 437-38, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968) ("School boards . . . operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.") (emphasis added). Furthermore, the Supreme Court has stated that, "[t]he remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). However, since the 1970s, Defendants have taken the position that they were not obligated to take additional steps in certain circumstances. In other words, the School Board unilaterally determined that they were not responsible for the racial imbalances; therefore, there was no need to take affirmative steps.

Although Defendants did not continue to employ aggressive desegregative techniques once the race ratios reflected the district-wide ratio, Defendants continued to

"consider" the racial compositions of the schools as decisions were made. However, despite the fact that Defendants may have been successful in desegregating the school system, they are obligated to make affirmative efforts to desegregate until unitary status is declared. With regards to student assignments, affirmative efforts would have included reassigning students, rezoning, marketing the majority to minority programs, etc. The Court acknowledges that Defendants have made affirmative efforts to a limited extent; however, Defendants' failure to adequately address the racial imbalances which developed in the elementary schools relatively soon after the desegregation plan was implemented, does not exhibit a good faith commitment to desegregation.[28] In other words, regardless of the cause of the imbalances, until Defendants sought a determination through the proper judicial channels, they were obligated to address these racial imbalances pursuant to the Court's orders. Moreover, the fact that a school system resists resegregation fortuitously, does not demonstrate good faith compliance with the Court's orders.

Without reiterating all of the abovementioned concerns for Edison, Graham, and Oak Park, the Court will merely emphasize the ***1302** statistics the Court finds important. In 1970, Edison had 1,788 school-aged children in its attendance zone, 343 (19.2%) were black. The actual racial composition for the 1972-1973 school year was 36% black and 64% white. By 1980, 584 (39.9%) of the 1,463 total school-aged students in Edison's attendance zone were black. The actual racial composition for the 1980-1981 school year was 55% black and 45% white. By 1990, Edison's attendance zone included 836

---

[28]Unfortunately, Defendants may have been misled by the content of an *ex parte* communication conducted with the Judge and his staff who previously presided over this case. This matter will be discussed below.

school-age students, 590 (70.5%) were black. The actual racial composition of students in attendance for the 1990-1991 school year was 69% black and 31% white.

In 1970, Graham had 1,687 school-aged children in its attendance zone, 374 (22.2%) were black. The actual racial composition for the 1972-1973 school year was 35% black and 65% white. By 1980, 462 (35.9%) of the 1,288 total school-aged students in Graham's attendance zone were black. However, the actual racial composition for the 1980-1981 school year was already 52% black and 48% white. By 1990, Graham's attendance zone included 1,220 school-age students and 523 (42.9%) were black. The actual racial composition of students in attendance for the 1990-1991 school year was 68% black and 32% white.

In 1970, Oak Park had 1,649 school-aged children in its attendance zone, but only 117 (7.1%) children were black. The actual racial composition for the 1972-1973 school year was 23% black, more than three (3) times the total number of black children 0 to 17 years old in Oak Park's attendance zone. By 1980, 664(39%) of the 1,703 total school-aged students in Oak Park's attendance zone were black. The actual racial composition for the 1980-1981 school year was 43% black and 57% white. By 1990, Oak Park's attendance zone included 1,580 school age students and 897 (56.8%) were black. The actual racial composition of students in attendance for the 1990-1991 school year was 61% black and 38% white.

As discussed above, the percentages of school-aged children in an elementary school's attendance zone, naturally, overstated the actual percentages of students who were elementary school-age students. Notwithstanding, the actual black enrollment at the five (5) elementary schools discussed above almost exclusively exceeded the total number of school-aged students in the entire attendance zone. Since the *total*

number of school-aged students in the attendance zones was an overstatement of *actual* attendees at the elementary schools at issue, and because the percentage of black school children actually attending each school almost always exceeded the "overstated" percentages, the Court is hesitant to accept Defendants' argument that a shift in demography is the sole cause the imbalance in these elementary schools.[29] Moreover, Plaintiffs have provided evidence that the discrepancies were not caused solely by a shift in demography. Defendants' failure to act affirmatively in light of these deviations necessitates continued supervision.

Interestingly, the parties focus almost exclusively on these sixteen (16) schools which have high percentages of black students in attendance. However, there is a significant number of other schools in which the racial compositions are disproportionate with the system-wide ratio. The fact that Plaintiffs failed to make much of this point is of no concern for the Court. The school system must be evaluated as a whole. In 1971, the Court expressed, in great detail, its concerns for all segregated schools. While the focus thus far has been on schools which have become racially identifiable as "black schools," the fact that there are numerous other schools which are virtually all "white" schools is equally concerning. The Court is concerned with every school which is becoming a one-race school. Although a school which is 90% white only

---

[29]While Defendants point to other variables such as majority black satellite zones which may have contributed to these discrepancies, the point is that Defendants made the decision to select and implement these satellite zones without taking "whatever steps might be necessary" and without making "every effort" to achieve the greatest possible degree of actual desegregation, to the extent practicable.

deviates approximately 10% from the district-wide ratio, it is also only 10% from becoming an absolute one-race school.

In the May 11, 1971, Order, this Court explained that, "[i]t was the Supreme Court's ***1303** view that while the existence of a small number of one-race schools is not a sure mark of a segregated system, in systems with a history of discrimination there is 'a presumption against schools that are substantially disproportionate in their racial composition.'" (1971 Order at 32) (quoting *Swann*, 402 U.S. at 26, 91 S. Ct. 1267). The Court also noted that of the seventy-nine (79) schools which the State Department of Education listed as white in a 1956 survey, in 1971, thirty-eight (38) were all or at least 95% white. *Id.* at 36, 91 S. Ct. 1267. According to Defendants' Exhibit 7, on October 24, 1994, there were eighteen (18) schools which were 90% or more white. Five (5) of those schools were 93% or more white. (DX 7). By October 30, 1995, twenty-four (24) schools were 90% or more white. Eight (8) of those schools were 93% or more white. (DX 7). By October 30, 1996, there were still twenty-four (24) schools which were greater than 90% white. Significantly, three (3) elementary schools had become 99% white and one (1) had become 97% white. At the junior high level, one (1) school had become 96% white and one (1) school had become 95% white. Consequently, the existence of these virtually one-race schools reveals that there were additional opportunities for Defendants to demonstrate a good faith commitment to desegregation.

Although Dr. Clark's report and testimony encompasses a degree of unreliability, based on the totality of the evidence, a shift in demographics is a substantial cause of the racial identifiability in Hillsborough County's schools. Plaintiffs' expert agreed that demographics have played a significant role in Hillsborough County; however, he asserted that additional factors should be considered and that it is premature to attribute racial imbalance in the schools to natural demographic change

until the 2000 census is available. While the Court finds a lack of good faith commitment to desegregation by Defendants, the Court is not suggesting that all racial imbalance should, or could, have been eliminated. It is probable that these few schools would have become racially imbalanced regardless of Defendants' efforts. However, the degree and magnitude of the racial imbalance could have been lessened if Defendants had acted affirmatively over the last twenty-seven (27) years. Unfortunately, with the passage of time, the availability and effectiveness of remedies diminishes.[30]

The second group of schools studied by Dr. Clark included: Cahoon Elementary, Clair Mel Elementary, Foster Elementary, Shaw Elementary, Sulphur Springs Elementary, West Tampa Elementary, Witter Elementary, Dowdell Junior High, and Van Buren Junior High. These schools were grouped together because they deviated plus or minus 20% from the system-wide ratios between 1980 and 1990. (T2 at 36).

Cahoon Elementary[31]

In 1980, Cahoon's attendance zone was comprised of 1,882 children ages 0 to 17. During this time, 396(21%) of these school-aged children were black. During the 1979-1980 school year, Cahoon's actual racial composition was 28% black and 72% white. There was a boundary change implemented for the 1980-1981 school year which slightly reduced the

---

[30]Defendants are not solely to blame for the long delay. Between 1975 and 1994, Plaintiffs failed to object or otherwise complain about the existence of racially unbalanced schools.

[31]The statistics used for these nine (9) schools were taken from DX 2, Table 5 and Appendix A to Defendants' Docket No. 796: *Boundary Changes, Race Ratios & Demographic Changes for the 14 Hillsborough County Schools with more than 40% Black Students.*

percentage of black school children to 27%. However, in the 1986-1987 school year, the boundary change implemented increased the percentage of black students to 38%, from 33% the previous school year. In 1990, the number of school-aged children in the attendance zone increased to 2,015; however, by this time, 677 (33.5%) of the school-aged children were black. The actual racial composition for the 1990- 1991 school year was 38% black and 62% white. During the 1991-1992 school year, the actual racial composition for Cahoon was 41% black and 59% white. The actual racial composition of students in attendance at Cahoon for the 1995- 1996 school year was 52% black and 48% white.

Clair Mel Elementary

In 1980, Clair Mel's attendance zone was comprised of 3,211 children ages 0 to 17. During this time, only 523 (16.3%) of these school-aged children were black. During the ***1304** 1979-1980 school year, Clair Mel's actual racial composition was 27% black and 73% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 35% black and 65% white. In 1990, the number of school-aged children in the attendance zone decreased to 2,832; however, by this time, 1,112 (55.1%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 41% black and 59% white. The actual racial composition of students in attendance at Clair Mel for the 1995-1996 school year was 49% black and 51% white.

Foster Elementary

In 1980, Foster's attendance zone was comprised of 1,397 children ages 0 to 17. During this time, 438 (31.3%) of these school-aged children were black. During the 1979-1980 school year, Foster's actual racial composition was 36% black and 64% white. During the 1984-1985 school year, a sixth

grade was added to Foster and one (1) white and fifty-two (52) black students were transferred from Foster to Lopez. In addition, Foster received fifty-four (54) white and twenty (20) black students from Orange Grove Elementary. Defendants assert that this transfer was implemented to accommodate the new sixth grade at Foster and to relieve the racial imbalances developing. During the 1984-1985 school year, the actual racial composition of students in attendance was 29% black and 71% white. In 1990, the number of school-aged children in the attendance zone decreased to 1,215; however, by this time, 637 (52.4%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 46% black and 54% white. The actual racial composition of students in attendance at Foster for the 1995-1996 school year was 61% black and 39% white.

Shaw Elementary

In 1980, Shaw's attendance zone was comprised of 2,330 children ages 0 to 17. During this time, only 312 (13.4%) of these school-aged children were black. During the 1979-1980 school year, Shaw's actual racial composition was 17% black and 83% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 31% black and 69% white. In 1990, the number of school-aged children in the attendance zone increased to 2,696; however, by this time, 911 (33.8%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 38% black and 62% white. The actual racial composition of students in attendance at Shaw for the 1995-1996 school year was 56% black and 44% white.

Sulphur Springs Elementary

In 1980, Sulphur Springs' attendance zone was comprised of 1,600 children ages 0 to 17. During this time,

only 242 (15.1%) of these school-aged children were black. During the 1979-1980 school year, Sulphur Springs' actual racial composition was 28% black and 72% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 44% black and 56% white. In 1990, the number of school-aged children in the attendance zone increased to 2,771; however, by this time, 1,431 (51.6%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 62% black and 38% white. The actual racial composition of students in attendance at Sulphur Springs for the 1995-1996 school year was 74% black and 26% white.

Witter Elementary

In 1980, Witter's attendance zone was comprised of 1,523 children ages 0 to 17. During this time, only 267 (17.5%) of these school-aged children were black. During the 1979-1980 school year, Witter's actual racial composition was 23% black and 77% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 32% black and 68% white. In 1990, the number of school-aged children in the attendance zone increased to 1,809; however, by this time, 743 (41.1%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 46% black and 54% white. The actual racial composition of students in attendance at Witter for the 1995-1996 school year was 54% black and 46% white.

West Tampa Junior High/ Elementary[32]

---

[32]West Tampa started out as a junior high school in 1971; however, it became a sixth grade center in the 1979-1980 school year. It was subsequently converted to an elementary school in 1986.

In 1980, West Tampa's attendance zone was comprised of 1,465 children ages 0 to 17. ***1305** During this time, only 305 (20.8%) of these school-aged children were black. During the 1979-1980 school year, West Tampa's actual racial composition was 21% black and 79% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 20% black and 80% white. For the 1986-1987 school year, West Tampa began serving grades K through 6. Defendants were required to implement numerous adjustments to complete this conversion. The actual racial composition of students in attendance at the "old" West Tampa Middle School before these changes were made was 25% black and 75% white. After these changes were made, the actual composition of students at the "new" West Tampa Elementary School for the 1987- 1988 school year was 47% black and 53% white. For the 1988-1989 school year, twenty (20) white sixth graders were transferred from Lockhart to West Tampa which lowered the percentage of black students to 42%. In 1990, the number of school-aged children in the attendance zone decreased to 1,379; however, by this time, 436 (31.6%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 44% black and 56% white. The actual racial composition of students in attendance at West Tampa for the 1995-1996 school year was 47% black and 53% white.

Dowdell Junior High School

In 1980, Dowdell's attendance zone was comprised of 7,494 children ages 0 to 17. During this time, 2,070 (27.6%) of these school-aged children were black. During the 1979-1980 school year, Dowdell's actual racial composition was 22% black and 78% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 37% black and 63% white. In 1990, the number of school-aged children in the attendance zone increased to 6,572; however, by this time, 2584 (39.3%) of the school-aged children were black. The actual

racial composition for the 1990-1991 school year was 41% black and 59% white. The actual racial composition of students in attendance at Dowdell for the 1995-1996 school year was 49% black and 51% white.

Van Buren Junior High School

In 1980, Van Buren's attendance zone was comprised of 10,998 children ages 0 to 17. During this time, only 1, 613 (14.7%) of these school-aged children were black. During the 1979-1980 school year, Van Buren's actual racial composition was 28% black and 72% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 30% black and 70% white. In 1990, the number of school-aged children in the attendance zone increased to 12,583; however, by this time, 4983 (39.6%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 42% black and 58% white. The actual racial composition of students in attendance at Van Buren for the 1995-1996 school year was 53% black and 47% white.

A study of the nine (9) schools which became more than 40% black in the second decade since the desegregation Order was issued reveals that the disparities between the percentages of black school-aged children in the attendance zones and the actual enrollment of black students are not as dramatic as the five (5) schools which became 40% black within the first decade. Nevertheless, the actual percentages of black students attending these nine (9) schools exceeded the total number of black children 0 to 17 years old in the attendance zones in virtually every instance. However, as discussed above, the failure to actively address these imbalances is more relevant to Defendants' good faith compliance with the Court's orders, rather than to the issue of whether Defendants currently have desegregated student assignments. Importantly, the fact that these schools did not become racially unbalanced until the

1980s provides support for Defendants' contention that gradual expansion of the black school-aged population caused the racial imbalance in these schools. "As the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system." ***1306** *Freeman v. Pitts*, 503 U.S. 467, 496, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992). However, the *Freeman* Court noted that, "[t]he causal link between current conditions and the prior violation is even more attenuated if the district has demonstrated its good faith." *Id.*

Defendant's other expert, Dr. Armor, testified about student race ratios within Hillsborough County. In addition, Dr. Armor summarized his findings in a report which was admitted into evidence as Defendants' Exhibit 1. Similar to the Court's definition of racially identifiable, Dr. Armor defined "racially balanced" schools as those schools that are within a plus or minus 20% variance from the district-wide racial composition. (DX 1 at 5). Dr. Armor indicated that prior to the Court's 1971 Order, only 12% of black students and 56% of white students attended racially balanced elementary schools. (DX 1 App. 1). During the first three (3) years of Defendants' desegregation efforts, 97 to 98% of black students and 99% of white students were in racially balanced schools. (T3 at 23). The percentage of white students that attended racially balanced schools remained above 90% through 1995, with the lowest percentage being 92%. (DX 1 App. 1). The percentage of black students attending racially balanced schools remained above 80% until 1989, was between 77% and 79% from 1989 through 1991, and since then, has remained around 70%. *Id.* Dr. Armor noted that "Hillsborough County has had a greater percentage of elementary students in racially balanced schools, and for longer durations, than any other districts I have evaluated in the Eleventh Circuit: DeKalb County, Savannah, and Muscogee County, Georgia." (DX1 at 5).

With regards to the junior and senior high schools, Dr. Armor reported:

> Charts 2 and 3 [which are appended to the report] show the percentage of junior and senior high students in racially balanced schools. Again, only 31 percent of black junior high and 54 percent of black senior high students were in racially balanced schools in 1970 before the court-ordered plan. Between 1971 and the mid-1980s, however, the rate reaches 100% in most years. Over 80 percent of black junior high students were in racially balanced schools until 1993, and all of the high schools have been balanced for the past three years. These rates for secondary schools are better than or comparable to other unitary school districts I have studies (sic).

(DX 1 at 6). In 1994, 79% of the black junior high school students attended racially balanced schools and in 1995, the percentages dropped to 75%. *Id.* From 1993 through 1995, 100% of the high schools were racially balanced.

Dr. Armor also testified about the dissimilarity and exposure indices for schools in Hillsborough County. A dissimilarity index is a statistical measure of the degree of racial balance. On a scale from zero (0) to one hundred (100), zero (0) represents perfect racial balance, i.e., a racial balance equal to the district-wide composition, and one hundred (100) represents a system with all one-race schools. (T3 at 27). Dr. Armor explained that the numbers in between correspond to the approximate proportion of students (both races) that would have to change schools in order to achieve a perfect racial balance, i.e., 23% black and 77% white. *Id.* According to Dr. Armor, any number below 30 indicates a very high degree of racial balance. *Id.*

On the other hand, the exposure index is the average percentage of white students in schools attended by black students. *Id.* at 29. Dr. Armor explained that it can be thought of as being a measure of the potential racial contact that black students experience in Hillsborough County. *Id.* Dr. Amor reported that:

> In 1970, the dissimilarity index is very high at 83, which is about average for southern schools districts at that time. The index drops below 20 between 1971 to 1973, which is about as low as it gets in large districts. The index increases gradually over the next twenty years, but it remains below 30 until 1991. For comparison purposes, the average dissimilarity index for large southern districts with mandatory desegregation plans was about 35 during the 1980s.
>
> The exposure index remains within ten points of its maximum value until the mid-1980s, but even at the present time it is 63, ***1307** which means that the average black student attends a school that is 63 percent white. In contrast, national figures show that the average exposure index for large southern districts had fallen below 50 by 1990, in large part because of white flight and falling enrollments.

(DX1 at 6). Dr. Armor explained that there is a greater degree of desegregation at the junior and senior high schools. "The exposure index is 70 or higher at the present time, and the dissimilarity index has remained below 30 since the beginning of the desegregation plan." *Id.*

Consequently, Dr. Armor concluded that the district-wide figures demonstrate that, "the district has maintained a very high degree of desegregation up to the present time. Hillsborough County has higher levels of desegregation than the

average large southern district, and it has higher levels of desegregation than other districts which have been declared unitary in the Eleventh Circuit." *Id.* at 7.

Dr. Armor also studied the student race ratios at all schools whose enrollments fell outside of the plus or minus 20% variance (whether or not it fell outside at the time he conducted his studies) for two (2) or more years between 1971 and 1995. *Id.* There were only twenty-two (22) schools, out of nearly 150 regular schools in the district, and only 15(10%) of the district schools were outside of the variances as of October 1995.[33] *Id.* Dr. Armor noted that none of the schools which were over 40% black as of October 1995, had been a former black school and none of these schools had a majority black enrollment before the 1971 Order. *Id.* at 7. Dr. Armor also emphasized that all of the schools that are over 40% black, except one (1), are located in the areas that Dr. Clark testified have experienced a substantial demographic change in the form of increasing black populations. *Id.*

In his analysis of the twenty-two (22) schools, Dr. Armor included a review of boundary changes that had the potential to affect racial composition by more than two (2) or three (3) percentage points. Dr. Armor compared the actual racial composition before the change to the projected racial composition after the change. *Id.* Dr. Armor concluded that the shift in demographics outlined by Dr. Clark explains why these schools moved outside of the plus or minus 20% range and that, despite the school board's efforts to improve racial balances, the boundary changes played a "relatively minor role in the racial

---

[33]It should be noted that Dr. Armor's studies excluded schools which were 93% or more white because they did not deviate by 20%. However, these "white" schools cannot deviate by 20% or more until they become virtually 100% white.

composition of these schools, being completely overwhelmed by demographics." (DX 1 at 11). Moreover, Dr. Armor testified that, "none of the schools that were currently imbalanced or were imbalanced in the past were caused by board action. They were caused by demographics." (Tr3-53). Dr. Armor concluded that, "the [School] Board did implement a highly effective desegregation plan that virtually desegregated the entire district to a very high degree of desegregation, as high as I've ever seen anywhere in this country, but especially in the south, and that it maintained that plan for a very long time." (T3 at 49).

Plaintiffs expert, Dr. Shelley, also recognized that the boundary changes were not significant in improving racial compositions. Dr. Shelley reported that boundary changes have not consistently contributed to reducing racial imbalance. (PX2 at 9). Dr. Shelley indicated that half of the boundary changes affecting the racially imbalanced schools reduced the percentage of black students at that school and the other half, resulted in an increase. Dr. Shelley admitted that it is possible that a boundary change that improves racial balance in one (1) school could exacerbate racial imbalance in another. *Id.* However, Dr. Shelley opined that since Hillsborough County, as a whole, is not highly segregated, it should be possible to redraw boundary lines without adversely impacting neighboring schools. *Id.* at 17.

Significantly, Dr. Shelley's conclusions regarding redrawing boundaries were based solely on the five (5) elementary schools which became racially imbalanced between 1970 and 1980. *Id.* at 19. While Dr. Shelley emphasized that the attendance ***1308** zones of these five (5) schools do not adjoin one another, he failed to evaluate the attendance zones of all the schools which do adjoin the racially unbalanced schools. Defendants' Exhibit 8 graphically depicts the attendance zones for the sixteen (16) racially unbalanced schools and clearly

illustrates the difficulties in redrawing attendance zones. Undoubtedly, it would be possible to bus children across the county to ensure racial compositions that comport with the district-wide ratios; however, that would not be practicable and was not required by the Court's 1971 Order. Moreover, it is not required by the Constitution or governing law. Although affirmative steps are required to achieve the greatest practicable desegregation, heroic measures to ensure racial balance system-wide are not. *See Freeman*, 503 U.S. at 493, 112 S. Ct. 1430.

A distinction must be made between requiring Defendants to maintain specific race ratios and requiring Defendants to make affirmative efforts to desegregate the school system. It is clear that Defendants were not obligated to maintain specific race ratios at each school in the county. "Neither school authorities nor district courts are constitutionally required to make year-by- year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann*, 402 U.S. at 31-32, 91 S. Ct. 1267. However, the Court is concerned that Defendants have not yet accomplished that affirmative duty. Defendants have an affirmative duty to eliminate the former dual school system. As noted above, the ultimate goal of a desegregation remedy is "a unitary, nonracial system of public education." *Green*, 391 U.S. at 436, 88 S. Ct. 1689. The school system no longer discriminates against school children on the basis of race when it affirmatively has eliminated all vestiges of state-imposed segregation. *Id.* at 435, 437-38, 88 S. Ct. 1689.

"What is involved here is the question whether the School Board has achieved the 'racially nondiscriminatory school system' *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system." *Green*, 391 U.S. at 437, 88 S. Ct. 1689.

The inquiry is whether the School Board has taken steps adequate to abolish its dual segregated system. *Id.* The Supreme Court in *Green* explained that school boards which were "operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Consequently, until a school system has discharged its duty to convert the dual system to a unitary one, the School Board's duty remains in place.[34] However, the Supreme Court in *Green* was faced with a school district that had not yet implemented an effective desegregation plan.

Since *Green*, the Supreme Court has had numerous opportunities to evaluate the effectiveness of desegregation plans which had already been implemented. In *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed. 2d 599 (1976) and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), the Supreme Court emphasized that, once a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the School Board's discriminatory acts.[35]

---

[34]The *Green* Court also noted that, " 'the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " 391 U.S. at 438 n. 4, 88 S. Ct. 1689.

[35]The Supreme Court has declined to precisely define the term "unitary" in a desegregation context. *See Dowell*, 498 U.S. 237 at 245, 111 S. Ct. 630, 112 L. Ed. 2d 715. However, to the extent the term is used to describe a situation where court supervision is no longer necessary, it must encompass a finding of good faith commitment. *See Freeman*, 503 U.S. at 490, 112 S. Ct. 1430.

The *Pasadena* case involved the appropriateness of the district court's requirement that the desegregation plan contain provisions insuring that minorities could never become the majority at any of the district's schools. *Id.* at 432, 96 S. Ct. 2697. Although ***1309** the Court in *Pasadena* only confronted "the question of whether the District Court was correct in denying relief when [the school district] in 1974 sought to modify the 'no majority' requirement as then interpreted by the District Court[,]" the Court reiterated the scope of permissible judicially created relief which is available to remedy violations of the Fourteenth Amendment. *Id.* at 432, 434, 96 S. Ct. 2697. The *Pasadena* Court explained that the district court had no authority to impose such an inflexible requirement when the subsequent changes in the racial composition of the schools might be caused by factors for which the school district could not be considered responsible. *Id.* at 434, 96 S. Ct. 2697. However, *Pasadena* cannot be applied as broadly as Defendants suggest.

The *Pasadena* Court held that, because the school district had obtained the objective of racial neutrality in its school attendance pattern when its desegregation plan was initially implemented, the district court could not require the school district to rearrange its attendance zones each year in order to ensure that the racial mix desired by the court was maintained in perpetuity. 427 U.S. at 436, 96 S. Ct. 2697. The Court explained that, "once [the school district] implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations . . ., the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.* at 437, 96 S. Ct. 2697.

Significantly, the *Pasadena* Court cautioned against applying its rulings generally. The *Pasadena* Court explained that it was error to enforce the district court's order to "require

annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school." *Id.* at 435, 96 S. Ct. 2697. Subsequently, the Supreme Court distinguished the inflexible portion of the plan in that case from desegregation plans involving an evaluation under governing case law. *Id.* The *Pasadena* Court explained:

> [I]t is important to note what this case does not involve. The "no majority of any minority" requirement with respect to attendance zones did not call for defendants to submit "step at a time" plans by definition incomplete at inception. Nor did it call for a plan embodying specific revisions of the attendance zones for particular schools, as well as provisions for later appraisal of whether discrete individual modifications had achieved the "unitary system" required by *Brown.* The plan approved in this case applied in general terms to all Pasadena schools, and no one contests that its implementation did "achieve a system of determining admission to the public schools on a nonracial basis."

Id. (internal citations omitted).

In order to align the instant case with *Pasadena* and *Swann*, with regards to student assignments, it must be clear that: (1) the implementation of Defendants' desegregation plan established a racially neutral system of student assignment in Hillsborough County; and (2) any post-1971 changes in the racial composition of the schools in Hillsborough County were not in any manner caused by segregative actions chargeable to Defendants.

In the case at hand, the parties do not dispute that all of the schools in Hillsborough County were desegregated as of the 1971-1972 school year. As of October 27, 1971, there were no majority black schools among the school district's 122 schools

and only one (1) school, Lee Elementary, had more than a 40% black student population. Moreover, Plaintiffs do not assert that Defendants' system of student assignments continued to segregate students after the desegregation plan was initially implemented. Plaintiffs did not file any written objections in this case concerning the actual or projected enrollments of any school in Hillsborough County for more than twenty-two (22) years after the 1971 desegregation plan was implemented. Plaintiffs failed to object to the racial compositions developing in the school system, despite the fact that Lee Elementary had become more than 50% black and Cleveland, DeSoto, Edison, and Gary Elementary had become more than 40% black as early as 1974. Moreover, Plaintiffs did not file their first objections to projected racial enrollments until June 1994. Plaintiffs' inaction ***1310** indicates that there were no perceived violations of the 1971 Order.

There is no indication that the racial identity of the schools in Hillsborough County has been deliberately caused by segregative policies or practices by Defendants. Nevertheless, there is a presumption that the racial imbalance is traceable to the prior *de jure* dual system and Defendants must prove otherwise. The Court suspects that Defendants' inaction has contributed to the degree of racial unbalance in the school system. Notably, the 1971 Order was required because the School Board refused to act after the Supreme Court decided *Brown I* and *Brown II* in the 1950s. Importantly, the Supreme Court has emphasized that a mere racially neutral assignment plan may be inadequate. *Swann*, 402 U.S. at 28, 91 S. Ct. 1267. A neutral student assignment system will be insufficient if it "fail[s] to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain artificial racial separation." *Id.* at 28, 91 S. Ct. 1267. While the Court acknowledges that a race neutral attendance pattern was

implemented in the case at hand, Court supervision remains necessary. Neutrality alone is not sufficient.

"The district judge or the school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools." *Swann*, 402 U.S. at 26, 91 S. Ct. 1267 (emphasis added). While the effective implementation of a desegregation plan may satisfy an element of the school districts' obligation under a desegregation order or consent decree, the courts' supervisory responsibility remains until a school board has: (1) eliminated the vestiges of past discrimination to the extent practicable; (2) exhibited a record of full and satisfactory compliance with the decree; and (3) "demonstrated to the public and the parents of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the laws and the constitution that were the predicate for judicial intervention in the first place." *See Lockett v. Board of Education of Muscogee County School Dist.*, 92 F.3d 1092, 1098 (11th Cir.1996) (quoting *Freeman*, 503 U.S. at 491, 112 S. Ct. 1430) ("*Lockett I*"); *Lockett v. Board of Education of Muscogee County School Dist.*, 111 F.3d 839, 842 (11th Cir.1997) ("*Lockett II*"). "[O]ne of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution." *Freeman v. Pitts*, 503 U.S. 467, 490, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992).

"Once [Defendants] implemented a racially neutral attendance pattern in order to remedy [the specific] perceived constitutional violations on the part of the Defendants, [this Court] had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *See Pasadena*, 427 U.S. at 437, 96 S. Ct. 2697. However, Defendants were not relieved from their

obligations once a means to an end was implemented.[36]

> [A] school district does not escape its obligation to make affirmative efforts to remedy racial imbalances simply because the imbalances are caused by circumstances "over which [the school district] has no control"; instead, while under court supervision the school district must make efforts to eradicate all imbalances which are traceable to prior de jure segregation.

Lockett v. Board of Education of Muscogee County School Dist., 92 F.3d 1092 (11th Cir.1996) (citing *Freeman*, 503 U.S. at 491, 112 S. Ct. 1430). The School Board's obligations remain until the Court finds that the racial imbalances are not traceable to prior *de jure* segregation. Significantly, such a determination has not been made in the case at hand.

In *Lockett I*, the Eleventh Circuit entertained arguments which were similar to those advanced by the parties in the instant case. The school district initially implemented student ***1311** reassignment and attendance zone adjustments which effectively achieved its goal of proportionate student representation, pursuant to the district court's 1971 desegregation Order. *Id.* at 1095. Throughout the 1970s, the school district maintained consistent statistical racial compositions within its schools. *Id.* at 1096. During the same

---

[36]Moreover, the fact that the parties entered into the 1991 Consent Order, requires additional consideration. Not only did Defendants remain obligated to fulfill their duties, in good faith, pursuant to the equitable relief ordered by the Court in 1971, but the Consent Order embodies an agreement of the parties and is contractual in nature to some extent.

period, the racial compositions of faculty and staff within most of the district's schools reflected the county-wide averages. *Id.*

However, by the end of the 1970s, the school district in *Lockett* began to curtail its desegregation efforts by reducing the number of student reassignments and attendance zone adjustments. *Id.* During this same time period, the demographics of the county began to shift. *Id.* By the mid-1980s, there was a decline in the number of schools with acceptable racial compositions and by 1991, a number of racially identifiable schools existed. *Id.* In 1993, the school district moved for a final dismissal and a declaration of unitary status. *Id.* In 1994, after an evidentiary hearing on the matter, the district court granted the school district's motion. *Id.*

Although the Eleventh Circuit initially reversed the district court (*Lockett I*), the Circuit Court subsequently granted the school districts' petition for rehearing and held that the district court's factual findings were not clearly erroneous and affirmed the district court's decision (*Lockett II*). *Lockett v. Board of Education of Muscogee County School Dist.*, 111 F.3d 839 (11th Cir.1997). Notwithstanding, the Eleventh Circuit in *Lockett I* reiterated established principles of law which are applicable to the case at hand.

In *Lockett I*, the school district argued that unitary status had been achieved by the 1980s and therefore, they were released from their obligations under the 1971 Order at that time, even though unitary status was not declared until 1994. 92 F.3d at 1097. Conversely, the plaintiffs argued that, "the school district's obligation to make affirmative efforts to desegregate the school system commenced in 1971 and did not end until the district court declared unitary status in 1994." *Id.* Moreover, plaintiffs argued that, the school district's failure to make good faith efforts to desegregate the system after the 1980s contributed to the racial imbalances in the schools. *Id.*

Significantly, the Circuit Court made it clear that, "[t]he school district was subject to the 1971 court order until such time as the district court vacated that order by declaring that the school district had achieved unitary status and complied with the order in good faith." *Id.* (citing *Pasadena*, 427 U.S. at 439-40, 96 S. Ct. 2697).

In the case at hand, Defendants continued their desegregation efforts after they initially achieved acceptable racial compositions throughout the school system in the 1970s. Moreover, Defendants continue to employ new desegregation techniques to date. Therefore, this case is somewhat distinguishable from *Lockett I* .The school district in *Lockett* implemented a neighborhood assignment plan which "affirmatively increased racial imbalances," whereas, Defendants in the instant case have not. *See Id.* at 1101. Furthermore, in *Lockett*, the school district never implemented a majority to minority transfer program, "a tool basic to 'every' desegregation program." *Id.*

Although Defendants in the case at hand have not "affirmatively" exacerbated racial imbalances and have implemented, *inter* alia, a majority to minority transfer program, Defendants "curtailed" their desegregation efforts.[37] Defendants never sought a determination of unitary status until the issue was raised *sua sponte* by the Court; however, for years, Defendants have failed to adequately address schools which became racially imbalanced. While the evidence presented by the parties establishes that a shift in demographics played a significant role in the racial compositions of the schools, Defendants have not demonstrated a good faith

---

[37]With regards to the instant case, the term "curtail" may be slightly misleading. In some instances, Defendants had not implemented basic desegregation techniques until the 1990s.

commitment to desegregation. Certainly, Defendants deserve acknowledgment for their desegregation efforts thus far; however, the Court intends that its criticisms will serve as a guide to Defendants as they implement desegregation techniques in the future. Defendants must take affirmative steps in order to be released from the Court's supervision." ***1312** Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979).

II. Good Faith

A. Desegregation Techniques

Defendants have been relatively successful in implementing desegregation techniques; however, Plaintiffs assert that Defendants have not utilized the available techniques to the maximum extent practicable. The number of racially unbalanced schools in Hillsborough County is relatively small. As of 1995, there were twelve (12) schools which were 50% or more black and five (5) schools that were between 40 and 49% black. Also, as of October 30, 1995, there were eight (8) schools which were 93% or more white. While Defendants may have believed that they had no obligation to adjust attendance zones to affirmatively combat segregation, other desegregative devices were available. Moreover, despite the impracticalities attendant to attendance zone adjustments, Defendants have had additional opportunities to desegregate the school system to the maximum extent practicable.

(i) *Majority to Minority Transfers*

Plaintiffs argue that, even though majority black schools existed since, at least 1977, as of April 19, 1996, there was not one (1) majority to minority ("MTM") transfer granted. (Br. in

Supp. of Pls.' Obj. to R & R at 17); (T1 at 91); (PX 14). Moreover, Plaintiffs argue that, despite the fact that a MTM transfer program was part of the Court's 1971 desegregation Order, Defendants did not market its MTM program to eligible students and their families until 1995, and no transfers had been processed as of April 1996. Plaintiffs argue that MTM transfer programs are a commonly used desegregation technique which is effective and does not require changes in attendance zone boundaries. However, Plaintiffs assert, Defendants have been negligent in fulfilling their desegregation obligations. Certainly, the history of this technique in Hillsborough County is concerning.

Plaintiffs argue that, there is no evidence that: (1) a MTM transfer was ever seriously considered until recently; (2) Defendants understood how to operate a MTM program; or (3) Defendants made any efforts to implement an effective MTM transfer program. Plaintiffs point out that the Administrative Assistant to the Superintendent, Dr. John Miliziano, testified that he was unaware of how MTM transfer programs worked in other school districts and that he had not read any literature concerning MTM programs. (T1 at 87-89). Also, Dr. Miliziano testified that it was not until the issue of an ineffective MTM program was brought up by Plaintiffs that the program was announced to the district as a whole and Defendants took action to publish information about the program. *Id.* at 89. Dr. Miliziano testified that he believes some children have been approved for transfers since the School Board took action. *Id.*

Dr. Miliziano testified that the utility of the MTM transfer program was not fully appreciated in the past and that it is possible that students who had been denied a transfer under the special assignment program, could have been eligible for a transfer under the MTM program. (T1 at 91-93). However, it is clear that, when the desegregation plan was proposed to the Court in 1971, Defendants understood the utility of a MTM

program. In the Court's July 2, 1971, Order (Docket No. 250), the Court explained that the MTM program, other transfer rules, the Bi-Racial Committee, and approval of site locations had been required by previous orders. (July 2, 1971 Order, at 9). The Court noted that these programs and procedures may not be required if the School Board's plan is effectuated and accomplished. *Id.* Interestingly, Defendants, perhaps being overly optimistic, sought to avoid the implementation of the MTM program before the desegregation plan had been approved. The Court acknowledged:

> In its responsive memorandum of June 28, 1971, the defendants say:
>
> "(a) . . . Should the Desegregation Plan submitted by Defendants to the Court be approved, there would seem no purpose for retaining the majority to minority provisions ***1313** for transfer, since such plan should result in a black to white ratio of approximately 20% to 80% in each and every school; accordingly, and of necessity, black students would be in a minority in schools at all levels . . . ."

Id. Nevertheless, the Court opined that it would retain jurisdiction and "require the continuation of all of these procedures to be available and used as necessary." *Id.* The Court subsequently discussed Defendants' continuing responsibility and noted that, to effectuate the plan "will require the same type of community involvement, diligence and effectiveness as has already been shown [in developing the desegregation plan]." *Id.* at 9-10.

During the 1996 evidentiary hearing, the following exchange took place:

Q. [Dr. Miliziano] [a]re you aware of the treatment of majority to minority transfers in the original 1971 order?
A. To tell you the truth, Mr. Gonzalez, I was--I read that order probably a dozen times. I really was a bit confused as to what that meant.
Q. Okay. Let me represent to you that the court order contains the language with respect to that majority to minority transfer: "The court is retaining jurisdiction and will require the continuation of all of those procedures to be available and used as necessary."

Are you aware of the plaintiffs or any of the plaintiffs' representatives ever suggesting that MTM transfers were necessary again?

A. To my knowledge, no.

Q. Are you aware of anyone associated with the Legal Defense Fund ever complaining about the fact that that program was hidden or not available to students?

A. To my knowledge, no. And I dealt with the Biracial Committee for many years, and no member of the committee ever brought that up. And to tell you the truth, I thought it was one of those things that was considered by the court and it was never meant to apply.

It wasn't until recently that I, a person who has spent many, many years in dealing with the court order, maybe it's stupidity on my part, but I didn't even know that this hidden clause--this clause, not hidden, but this clause in the consent order meant really anything.

It wasn't until recently that it was brought to my attention that, hey, this thing is supposed to be done,

> and now that you have schools that are 50 percent black or higher, you're supposed to implement this policy.

(T1 at 106-07).

Plaintiffs argue that Dr. Miliziano's lack of understanding regarding the MTM program is significant because no Hillsborough County school system employee has more extensive school desegregation responsibilities than Dr. Miliziano. Plaintiffs maintain that the failure to understand and aggressively market the MTM program to the parents of children attending majority black schools illustrates Defendants' lack of good faith commitment to desegregation. Moreover, Plaintiffs maintain that this is another example of a lost opportunity.

It is very disturbing that Defendants' "in-house" desegregation expert testified that he did not completely understand the import of the MTM program. In 1971, Defendants argued that the transfer program would be unnecessary because all schools would be minority black. However, in 1996, Defendants assert that the usefulness of the program was not understood or appreciated. Notwithstanding, in Exhibit 2 to the Court's July 2, 1971, Order, the Court explicitly outlined the rules to be applied in connection with transfers and identified MTM transfers as the first exception to the transfer rule. Certainly, Defendants' lack of appreciation casts doubt on the competence of the individuals charged with the task of desegregating the schools. Moreover, Defendants could have sought clarification from the Court over the last two (2) decades.

The Magistrate Judge explained that, "[a]lthough the absence of M to M transfer applications is troubling, the Court's 1971 Order did not require the defendants to solicit M to M transfers; they were only required to grant them if requested.

There has been no violation of the Court's Order as to the M to M transfer policy." ® & R at 74). Notwithstanding, the Court finds that this interpretation ***1314** of Defendants' ongoing obligations is too narrow. While the Court did not specifically direct Defendants to market the program, surely if Defendants fully embraced their desegregation obligations they would have wanted to utilize this technique to the fullest extent or at least, made an effort to understand it.

> In the May 11, 1971, Order, the Court explained that,
>
> Since 1954 it has been clear that segregated schools are illegal and that the school boards and the courts, if necessary, have a duty to take affirmative action to desegregate them.
>
> On April 20, 1971, it became and is crystal clear that affirmative action ordered by this and other courts for that purpose, and consistently opposed by certain defendants, is legal.
>
> * * * * * *
>
> Some of this may not be known by some or all members of the present board, although it should be. To be sure that they do know, a copy of this Order and a copy of the April 20, 1971, Supreme Court opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, will be sent separately to each defendant. It is assumed that being informed each will fulfill his or her sworn obligation to "support and defend the Constitution of the United States," as did the Court. Each should remember that he *is* a defendant, and that the Court *will* uphold its obligation.

(May 11, 1971, Order at 1-2) (citation omitted).

Significantly, the Supreme Court in *Swann*, emphasized that,

> [a]n optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such transfer program must grant the transferring student free transportation and space must be made available in the school to which he desires to move.

402 U.S. at 26-27, 91 S. Ct. 1267 (emphasis added).

The Court ordered service of this Supreme Court opinion on Defendants in 1971; however, Defendants failed to take the time to understand, let alone implement, an effective MTM program. The Supreme Court in *Swann* ordered that school districts provide free transportation to the student and make space available, but twenty (20) years later, Defendants seek to hide behind the fact that this Court did not specifically indicate that the program should be publicized. This falls far short of demonstrating good faith compliance and, is indeed, troubling.

Defendants have also gone to great lengths to align the instant case with the Supreme Court decision in *Freeman*. However, there are some substantial difference between the two (2) cases. Foremost, the school district in *Freeman* was comprised of 5.6% black students when the desegregation order was initially entered in 1969. 503 U.S. at 475, 112 S. Ct. 1430. Significantly, by 1986, the percentage of black students had

grown to 47%, whereas, in the case at hand, the influx has not been nearly as remarkable. *Id.* Moreover, the county had become highly segregated in *Freeman*. *Id.* In addition, the school district in *Freeman*, on its own initiative, implemented a majority to minority transfer program three (3) years after the desegregation order was entered. *Id.* at 479, 112 S. Ct. 1430. "The program was a marked success." *Id.* Conversely, in the instant case, Defendants had not granted one (1) majority to minority transfer as late as 1996, twenty-five (25) years after the desegregation order was entered.

(ii) *Magnet Schools*

In addition, Plaintiffs emphasize that Defendants failed to develop magnet schools and/or programs, except for the magnet program at Tampa Bay Technical High School, until 1993. Plaintiffs contend that magnet schools have been used by school districts for desegregation purposes since the 1970s. (PX1 at 10). Moreover, the federal government has provided special funds for such ***1315** schools since the 1980s. *Id.* However, the Hillsborough County school system did not create its first magnet schools until 1993. *Id.* While Defendants deserve praise for implementing these magnet schools/programs, the prolonged delay detracts from their achievement.

Plaintiffs argue that implementation of the Middle School Plan is still in progress and it is impossible to foresee the ultimate racial composition of all schools until the plan is completely implemented. Plaintiffs maintain that the race ratio projections for 1997, taken from the 1991 plan, were not met. Plaintiffs point out that the experience thus far, with regards to West Tampa, Edison, Cleveland, Sulphur Springs, and Clair Mel, has been that the proportion of black students at these schools has exceeded the projections made in 1991. Plaintiffs contend that if Defendants fail to take affirmative steps to adjust

race ratios after complete implementation of the Middle School Plan, the school system will experience an increase in the number of racially identifiable schools, as well as, the magnitude of racial identifiability of each school.

To illustrate, Plaintiffs argue that, before the plan, there were six (6) schools that were 50% black or higher. (PX 1 at 15-16). Although the projections in the Middle School Plan anticipated a decrease to five (5) schools, the actual number had increased to twelve (12) by the fall of 1995. *Id.* There were nine (9) schools that were between 40 an 49% black before the plan was implemented. *Id.* According to Defendants' 1991 projections, there was supposed to be seven (7) schools that were between 40 and 49% black. *Id.* By the fall of 1995, there were only five (5) schools in this range. *Id.* However, overall, fifteen (15) schools were considered racially unbalanced before the plan; the 1991 projections predicted that the number would decrease to twelve (12). *Id.* Unfortunately, the number increased to seventeen (17). *Id.*

(iii) *Ex Parte Communications*

An unfortunate occurrence which may have contributed to Defendants' apathetic attitude over the past several years was that Defendants were given *ex parte* advice from the previously presiding judicial officer. Plaintiffs argue that, "[t]he testimony of Dr. John Heur leads to further doubt about defendants' representations to this Court." (Pls.' Br. in Supp. of Pls. Objs. at 52). Plaintiffs explain that Dr. Heur served as the Director of Pupil Administrative Services for the Hillsborough County school system and was responsible for implementation of Defendants' desegregation plan, including participating in the submission of plans and annual reports to the Court. Dr. Heur testified that he had several *ex parte* conversations with the judge then presiding over this case, as well as, the presiding judge's law clerks. (T7 at 13-16).

Dr. Heur explained that most of the time he was asked to explain information included in the School Board's submissions to the Court. (T7 at 15). However, on one occasion, the presiding Judge told Dr. Heur that the schools could be "left alone" if the School Board had not been the cause of a deviation from the ideal race ratios stated in the 1971 desegregation Order. *Id.* at 16. Dr. Heur testified that, as a result of the *ex parte* conversation with the presiding judge, he understood it to mean that if the change in racial composition in a particular school was caused by housing patterns, rather than, gerrymandering done by the School Board, then the School Board was not obligated to make changes to that schools' attendance boundaries. *Id* at 17- 18. Notwithstanding, Dr. Heur testified that the School Board, in fact, continued to adjust the race ratios if they deviated from the target ratios. *Id.* at 18.

The Magistrate Judge emphasized that, regardless of any ex parte advice that may have been given, Defendants continued to take steps to improve the racial balances when making boundary changes and opening and closing schools. ® & R at 85). The Magistrate Judge explained that, "[i]f this advice was indeed given, there is no inconsistency between the advice and the Court's Orders. These *ex parte* conversations, while unfortunate, were not initiated by defendants and do not demonstrate a lack of good faith on the part of defendants in complying with the Court's orders."

There is no dispute that the *ex parte* communications were inappropriate. However, standing alone, the *ex parte* communications do not evidence bad faith. Nevertheless, ***1316** in light of the Court's findings, the communications may explain why Defendants failed to take affirmative action to desegregate the school system. Defendants have taken the position that, once the attendance zones were drawn and the schools reflected the system-wide racial composition, albeit for a brief period of time, the School Board had no further

obligation to take affirmative steps to convert to a unitary system. This philosophy is clearly erroneous. Consequently, Defendants have failed to meet the Constitutional commands espoused in *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. ED. 2D. 1083 (1955), and the Court will retain jurisdiction over the educational policies related to student assignments.

In order to fully apprise the parties of the posture of this case, the Court will address Plaintiffs objections to the Magistrate Judge's findings in connection with the remaining *Green* factors. The following factual findings are taken from the Magistrate Judge's Report and Recommendation:[38]

FACULTY AND STAFF ASSIGNMENTS

1. For the 1993-1994 school year, 14% of the teachers in Hillsborough County were black. For the same year, blacks constituted 17% of the principals, 22.2% of the assistant principals, and 7.9% of the district administrators (at the main school board office). Of the noninstructional permanent personnel, 16.1% were black. Black teacher aides comprise 25.3% of the total teacher aides employed by the county.[39]

2. According to Marilyn Whittner, Director of Human Resources, the School Board has "a dearth of minority applicants for our teaching positions and we are constantly seeking minority teachers." (T2 at 105) The School Board focuses recruitment efforts at colleges with a substantial percentage of black graduates.

---

[38]*See* R & R (Docket No. 809) pgs. 34-57.

[39]Defendants used district-wide employee data from the 1993-1994 school year at the unitary status hearing. (T2 at 134)

3. Additionally, a mentoring program has been instituted for black teachers who aspire to be administrators. More than one-half of the graduates of that program have been placed in administrative or teacher resource positions. (T2 at 108-09; PX 14)

4. For instructional and non-instructional personnel, the principal at an individual school interviews prospective applicants and is authorized to make offers contingent on approval by School Board and staff. Principals are given criteria for open positions. If Human Resources determines that a new hire would adversely affect the racial ratio at a particular school it will disapprove the offer unless no other qualified candidates are available. (T2 at 112-116)

5. Instructional personnel employed by the School Board are represented by a union which negotiates salaries based on the level of service and academic degree held by the employee. These salary levels are applied across-the-board to all teachers. (T2 at 114-15

6. There are currently no schools in which black teachers or staff constitute a majority nor has that situation existed in the past since the 1971 Order was entered. (DX 7)

7. The parties' experts differ on whether some schools are racially identifiable due to their faculty and staff compositions. Using a 15% deviation standard, Dr. Stevens identified twelve elementary schools which are not in compliance with the district-wide ratio. However, Dr. Armor, Defendants' expert, did not find any schools which fit into this category. This is because Dr. Armor used only faculty data; Dr. Stevens used data from the annual reports which aggregate faculty and staff and include non-certified personnel. (T4 at 139) However, the 14% figure cited by Defendants referred only to black faculty, not staff. (T2 at 130, 132)

8. None of the Court's Orders have ever required the School Board to provide racial balance at the upper management level. However, Plaintiffs note the paucity of upper-level black administrators during the time the School Board has operated under court supervision. During this period, only one (1) of the six (6) Assistant Superintendent positions has been held by a black individual: Assistant Superintendent of Support Services. (T7 at 145-47)

***1317** 9. Defendants have never been found liable for racial discrimination in employment based on records which have been maintained since at least 1977. Some complaints have been resolved at the administrative stage. (T7 at 199-200)

10. The School Board has in place grievance procedures which can be utilized by parents and students as well as employees and includes various levels of review, including a public hearing before the School Board. Student handbooks distributed to every student at the start of the school year outline these procedures. (T7 at 201-04)

11. Dr. Samuel Horton, an educator with the School Board between 1977 and 1991, served as General Director of Secondary Education where he helped develop guidelines for the gifted program among other programs. He noted the absence of any blacks in assistant superintendent positions during that time. Dr. Horton, who is African-American, stated that he applied twice for the position of Assistant Superintendent for Instruction but was not selected either time. While he did not file a grievance, Dr. Horton testified that he believed he was not selected due to his race. (T6 at 88-96; 103)

12. Ann Porter, head of the Tampa branch of the NAACP, testified about concerns about black males being denied employment opportunities and other complaints she

receives.[40] Ms. Porter, who is African-American, meets with the Superintendent and staff on the average of once or twice a month. This working relationship has become stronger with the current Superintendent, Dr. Earl Lennard. Although she is opposed to a declaration of unitary status at this time, Ms. Porter admitted that many complaints are resolved through these informal meetings. (T6 at 139-41)

TRANSPORTATION

13. With regard to transportation of students, the School Board's obligation has been to insure that bus routes and assignment of students to buses "assures the transportation of all eligible students on a non-segregated and otherwise non-discriminatory basis" and to regularly re-examine its transportation system. (July 1971 Order at 10)

14. In 1996, the School Board transported approximately 80,000 students daily. It is the fifth largest school district in the nation in terms of the numbers of students transported. (T1 at 123) For the 1994-95 school year, the School Board received over $17 million in state funding for transportation. (DX 24)

15. As required by Florida law, any student attending a school two (2) or more miles from his residence must be furnished transportation by the school district. (DX 21) The School Board has always complied with this requirement. (T1 at 122-25)

---

[40]Ms. Porter was not asked about a venture between the University of South Florida and the School Board launched in August 1995 to place black male teachers with the School Board after graduation. (DX 14, "Project PILOT" documents)

16. The School Board provides transportation for all students who qualify and no distinctions are drawn as to race. (T1 at 131-33)

17. The desegregation technique adopted in the 1971 Order involved closing the formerly all black schools and assigning them to "satellite" attendance zones. (T4 at 135-36)

18. The School Board has maintained data on the number of students transported annually and their race. For the 1995-96 school year, approximately 18,400 students were transported for desegregation purposes including students attending magnet schools. (PX 1 at 20)

19. Of this number, more black students than white students were transported at each of the three (3) school levels: elementary, middle, and high school. (PX 1 at 20)[41]

20. At no time after the 1971 Order was entered did Plaintiffs raise any objection about the number of students bused, including when the desegregation plan was modified in the 1991 Consent Order due to implementation of the Middle School Plan.

***1318** 21. Part of the reason for adopting the Middle School Plan was to allow students to attend schools close to their homes as much as possible. (T1 at 65)

22. Although the 1971 Order did not require provision of transportation for after-school activities, the School Board

---

[41]Of the elementary students transported 23% were black and 10% were white. At the middle school level 26% were black and 18% were white. Of the high school students, 24% were black and 8% were white. (PX 1 at 20)

provides "activity buses" for after- school activities to afford students living in satellite areas (a non- contiguous attendance zone area) the opportunity to participate in those activities if they were not able to provide their own transportation. Because the junior high schools are being phased into middle schools which are "self-contained" in their activities, the activity buses are primarily used at the high schools. (T1 at 123-30) Activity buses are provided for any students who need to stay after school for any reason, and are not limited to athletics or clubs. (T1 at 138-41)

23. In 1989, the School Board examined whether providing only one (1) activity bus per satellite area met the needs of the students. The Superintendent and his staff determined that more than one (1) activity bus per school might be needed on certain days due to the number of activities and events scheduled at the schools. (DX 23)

24. This policy was implemented and remains in effect today. The School Board supervisor of transportation surveys schools on a weekly or daily basis to determine the number of buses needed. (T 131-36; 138-41)

EXTRACURRICULAR ACTIVITIES

25. Under this Court's desegregation plan the School Board has been ordered to regularly re-examine its extracurricular activities to insure that they are maintained and operated on a non-segregated and non-discriminatory basis. (July 1971 Order at 10)

26. In the fall of 1971, the Hillsborough County school system was integrated in its athletic programs and all students, regardless of race, were given an equal opportunity to participate in athletics. (T1 at 112-13)

27. Since that time, a committee composed of the athletic director and assistant school principals has regularly reviewed proposed changes in the athletic programs pursuant to policies adopted by the School Board. The School Board offers a number of athletic programs, ten (10) for females and ten (10) for males. (T1 at 113-15)

28. Athletic activities are offered at each senior high school and existing junior high school. They have been eliminated at the middle schools as part of the restructuring program and due to funding. The director of athletics hopes to provide athletic programs at the middle schools in the future. (T1 at 114-15; 119-20)

29. Of total student participation in athletics, approximately 23% of the athletes were black and approximately 77% were white for the school year 1996-1997. Participation varied from school to school and sport to sport. For example, total participation in basketball for black students was 54% (males) and 49% (females). On the other hand, participation by blacks on high school swim teams was very low. Only three (3) black students (1 female, and 2 males) participated on high school swim teams. Over 18% of the cheerleaders were black. (DX 28; T1 at 115-19)

30. The School Board also offers a variety of other extracurricular activities at senior high schools, including: drama, choral program, string and instrumental music programs, honor clubs, service clubs and various interest clubs. (T2 at 127-28)

31. Defendants do not maintain data on a school by school basis for extracurricular activities but do track overall participation by race. In 1995, black students accounted for 11% of the honor society memberships, 12% of drama clubs,

27% of student councils, 20% of marching bands, 14% of orchestras, and 19% of choral groups. (PX 1 at 27)

32. These activities are open to all students and no students are denied the opportunity to participate because of their race.[42]

*1319 FACILITIES AND RESOURCE ALLOCATION

Site Selection and School Openings and Closings

33. The School Board's duty as to facilities under this Court's Order is the same as with transportation and extracurricular activities. As required by prior orders of the Court, the School Board was to make sure that school construction, school consolidation and site selection (including the location of any temporary classrooms) would be "done in a manner which will prevent the recurrence of the dual school structure." (July 1971 Order at 11)

34. The School Board has reported to this Court the opening and closing of schools and the impact of these actions on the race ratios at the schools. (T1 at 24) It has also presented proposed plans to the Bi-Racial Committee for input. (T1 at 64)

---

[42]Mae King, mother of an Armwood High School student, testified that she observed cheerleading try-outs at Armwood recently because she was concerned that there were not enough black cheerleaders. As a result of the try-outs, however, three (3) blacks were chosen for the varsity squad and three (3) were chosen for the junior squad. (T4 at 17-27) Ms. King also recounted an incident where a suggestion was made at a PTA meeting to have a black disc jockey at a school dance and some of the people at the meeting got upset and walked out. (T4 at 20-21; 27-28)

35. Between 1971 and 1993 the School Board has constructed 25 new schools. In most cases, the percentage of black students attending these schools the first year was brought closer to the 80/20 ratio. (DX 4)[43] By 1995, five additional schools were built. (PX 1 at 8) None of the new schools has been opened with an all-white population or a black population of close to 40 percent. (T1 at 26)

36. As a general rule, the School Board has approved construction of new schools in areas of increasing population growth and where the greatest amount of overcrowding exists. (T1 at 25) During the past twenty-five (25) years, most new schools have been opened in the suburbs. In every case of a new school opening, the School Board has taken into account the projected race ratios at the new schools and assigned satellite attendance areas if necessary to maintain a racial balance at those schools. (T1 at 33) Especially with the elementary schools, the School Board tried to assign students to a school near their residence so they could walk to school. (T1 at 43)

37. A total of nine (9) schools have been closed since the 1971-1972 school year. (DX 5) When those schools were closed, the School Board took into account the race ratios at the closed school and the schools to which the pupils were reassigned. (T1 at 30-31) In most cases, the closing of the schools brought the schools the students were reassigned to closer to the 80/20 ratio. (DX 5)

38. Plaintiffs have been notified of all school construction through the reports filed with the Court as to boundary changes. Plaintiffs have never objected to the

---

[43]The School Board's exhibit does not address schools opened after the 1993 school year.

location of new schools. Although most of the new schools have been opened in the suburbs, Blake High School, which is a magnet high school opened in the 1997-1998 school year near downtown Tampa. Defendants have also opened several magnet schools in predominantly black, inner-city areas: Lee, Phillip Shore, and Dunbar Elementary Schools, as well as, Young and Middleton Middle Schools. (T1 at 155; 174-177)

Overcrowding

39. During the past ten (10) to twelve (12) years, overcrowding has become a problem for most Hillsborough County schools and double sessions a reality at some. (T1 at 61)

40. Plaintiffs introduced evidence that the schools having a black student enrollment of 40% or more are more likely to be overcrowded in terms of their Florida Inventory of School Houses (FISH) capacity. Plaintiffs' demographics expert, Dr. Shelley, testified that schools with a 40% or more black enrollment are more likely to have enrollments significantly over their FISH capacities than schools which are racially balanced. (T4 at 37; PX 2 at 11-13, 22-23)

41. Dr. Shelley's data also shows that in 1995, a total of 102 public schools in Hillsborough County were more than 25% over their FISH capacity: eighty-eight (88) were racially balanced schools and fourteen (14) were unbalanced[44] schools. Only eight (8) of the ***1320** eighty-eight (88) balanced schools were more than 50% over their FISH capacity but four (4) of the fourteen (14) unbalanced schools fell into this category. (PX 2 at 23)

---

[44]Dr. Shelley used the same measure of racial imbalance used by Dr. Armor and Dr. Stevens.

42. However, the FISH capacity of a school does not include portable classrooms. Use of portables does not necessarily mean that a school is overcrowded. (T4 at 101-03)[45]

43. Some classes, particularly those which are federally funded, provide an opportunity for a lower pupil to teacher ratio. Thus, a classroom built for twenty-five (25) or thirty (30) children may hold only twenty (20) children. (T1 at 63-64) Most, if not all, of the sixteen (16) schools with black student enrollments of 40% or more are included in the sixty-one (61) "Title 1" schools in Hillsborough County which received additional funding per pupil for the 1996-1997 school year. (DX 37)

44. The School Board recognizes that overcrowding is a serious problem and that the entire community is concerned about it. Last year, voters approved a sales tax increase. Moreover, the School Board appointed an Overcrowded Schools Task Force. The Superintendent and his staff compiled data for all Hillsborough County public schools including FISH capacity, number of portables, as well as the acreage of each school site. The Percentage of Capacity Report (DX 32) generated for the Task Force and the School Board is being used to determine what measures need to be taken to relieve overcrowding. (T7 at 222-24)

45. Although no testimony was provided interpreting the Percentage of Capacity Report in terms of individual schools, it appears that of the 105 elementary schools surveyed, the ten (10) elementary schools with the highest number of points

---

[45]Defendants have provided a 46-page list entitled "Relocatable Classroom Inventory" which listing all portable classrooms placed in use between 1949 and 1995 and their locations. (DX 29)

include Edison, Witter, DeSoto, Shaw and Cleveland, all of which have black student enrollments of 40% or more. (DX 32, Elementary Schools, at 1)

Teacher Resources

46. For the 1992-1993 and 1994-1995 school years, schools with a black student enrollment of 40% or more had a lower teacher-student ratio than the other schools with fewer than 40% black students. (DX 1, charts 33 and 36)

47. For this two-year period, there was also no discernable difference in terms of educational degrees and experience between the teachers at the over 40% schools and those which were under 40% in terms of black student enrollment. (DX 1, charts 33-36)

Expenditures

48. In 1995, the School Board had a budget of $1.2 billion. (T7 at 150)

49. Funding is received from three (3) separate sources: federal, state, and local. Funds for operating expenses come from the Florida Educational Finance Program (FEFP), a state program that funds school districts based on the needs of students and the costs to provide education in the school district as opposed to other Florida school districts. The FEFP funds come from three (3) sources: state revenue based on sales tax, local property tax revenue, and revenue from the state lottery. (T1 at 185-88)

50. The School Board also receives funding from the federal government for educating handicapped students and funding based on the socioeconomic needs of the students. Capital outlay expenses for new schools and other capital

expenses come from local taxes. The School Board also receives some state funds generated from gross receipts on utilities. (T1 at 188)

51. Various agencies of the federal and state government regularly audit the School Board to insure expenses meet the program requirements and that funds are allocated on an equitable basis. (T1 at 190-91; 195-97)

52. There is no difference in the per capita expenditures of the School Board on instructional salaries for teachers district-wide regardless of the racial composition of the schools. (DX 1, charts 37, 40) As stated in the preceding discussion of faculty and staff, instructional salaries are set by the collective bargaining agreement between the teacher's ***1321** association and the School Board. The federal government also prescribes comparability standards for employees paid by federal funds. (T1 at 199)

53. Funding for instructional resources is allocated by the School Board on a pupil by pupil basis without regard to race, ethnicity, gender, or other limits such as the FISH capacity for the school. When a group of schools is converted to the middle school plan, those schools receive additional resources due to the conversion. (T7 at 191-93)

54. A comparison of expenditures for instructional supplies and equipment for fiscal years 1993 and 1995 showed that elementary and junior high schools which were more than 40% black received slightly less funding than schools which were less than 40% black. (DX 1, charts 38 and 41)

55. The School Board attributes this difference to "conversion funds distributed to schools which were newly constructed or reconfigured pursuant to the Middle School Plan" and notes that "[m]ost of the over 40% schools [are] not

scheduled for conversion until the 1996-1997 and 1997-1998 school years." (Dkt. 797 at 83) The record supports this argument. (T1 at 97)

56. In addition, a study of total capital expenditures for fiscal years 1993 and 1995 indicates that there was essentially no difference between schools which were over or under 40% black. During the latter year, elementary schools which were over 40% black received more funding. (DX 1, charts 39 and 42)

57. A review of capital expenditures during the period 1991 to 1995 by Dr. Armor revealed that expenditures for inner city elementary schools (which comprise most if not all of the more than 40% black schools) were slightly higher than those of the other elementary schools.[46] Spending for the inner city junior high schools was substantially higher than other junior high schools. (DX 1, chart 43)

QUALITY OF EDUCATION

58. Several witnesses called by Plaintiffs, including Plaintiff Andrew Manning and School Board Chair Doris Reddick, testified poignantly about the differences between black and white schools in the era of *de jure* segregation. Mr.

---

[46]Darrell Daniels, one of the witnesses called by Plaintiffs, is employed with the Urban League and operates youth development programs at Robles and thirty-one (31) other schools. One (1) of his children attends Robles. While commending the principal of Robles, Mr. Daniels, who is African American, criticized the lack of commitment to education which he saw in the other personnel at the school. He also felt that Robles did not have the equipment such as computers which other schools have. However, he agreed that a school's commitment to education can vary regardless of the racial make-up of the school. (T6 at 58-77)

Manning and Ms. Reddick attended public schools in Hillsborough County. Ms. Joanna Tokley taught in the public schools, both before and after the Court's 1971 desegregation order. All three (3) are African-American. (T3 at 163-68; T5 at 20-23; T6 at 103-110)

59. Orders entered in this case have not required the School Board, in dismantling the dual school system, to attain specified levels of student achievement or any other standard to evaluate quality of education. However, this Court's referral order directed that the quality of education, along with the other *Green* factors be evaluated, as well as, the School Board's good-faith commitment in determining whether the public schools of Hillsborough County have attained unitary status.

60. Evidence presented by the parties concerning the quality of education today focused on academic achievement, enrollment in gifted programs, and suspension and dropout rates. Other factors bearing on quality of education such as facilities and resources as well as magnet programs have been addressed in the preceding sections.

Achievement Tests

61. Since 1977, the School Board has examined the results of achievement tests by students of different races on a regular basis. (T2 at 147)

62. Dr. John Hilderbrand, who has supervised testing for the Hillsborough County school system since about 1977, testified that there are an increasing number of state-mandated tests for students that are administered ***1322** and evaluated by the School Board. (T2 at 138-40)

63. On the Stanford Achievement Test, Hillsborough County students scored slightly below the 50th percentile in

reading and slightly above the 50th percentile in math and language which is the average rank for a national population. (T2 at 139-140) A standardized writing exam given to students in the fourth, eighth and tenth grades demonstrates that Hillsborough County students score higher than any of the other large school districts in the state. (T 2 at 140) Similar results are obtained on the High School Competency Test (HSCT). (T2 at 141) Scores for black students on the writing exam and HSCT show that Hillsborough County students outperform state averages for those tests. (T2 at 141)

64. A voluntary test taken by about 47% of seniors in high school--the Scholastic Assessment Test--has consistently produced results that place Hillsborough County students above national and state averages. When the scores are analyzed by race, the same result is shown. Black students in Hillsborough County outperform state and national norms. (T2 at 141)

65. In attempting to evaluate how well the school system is educating all of its students, Dr. Armor examined standardized tests (the Stanford Achievement Test) given to fifth grade students in Hillsborough County in the spring of 1994 and the spring of 1995. Overall, black students scored sixteen (16) to seventeen (17) points lower than white students in reading and math. (T3 at 88-89; DX 1, chart 44) This represents approximately three-fourths of a standard deviation. (DX 1 at 21)

66. A nationwide study conducted in 1992 found that similar differences exist between blacks and whites at all grade levels in math and reading; the achievement gap ranges from two-thirds to four-fifths of a standard deviation depending on the grade and test level. (DX 1 at 21)

67. However, when performing a regression analysis which used socioeconomic factors relating to family income,

single or two parent families, and the educational background of the parents, the gap in scores between black and white students narrows considerably. (T3 at 90-101; DX 1, chart 45) Dr. Armor concluded that about 60% of the gap in the reading scores for black and white students and about 66% of the math scores can be explained by socioeconomic factors. (DX 1, chart 46)

68. Additionally, when the first grade test scores for the same group of students are added as an additional variable, almost 75% of the reading gap and 90% of the math gap is explained by these variables.[47] (DX 1 at 22-23, chart 47)

69. An analysis of Stanford Achievement Tests taken by eighth grade students revealed similar results. About 71-72% of the gap in reading scores and about 84-86% of the gap in math scores between black and white students in Hillsborough County for the same years was attributable to a combination of socioeconomic factors and first grade test scores. (DX 1 at 23, charts 48 and 49; T4 at 98-100)

70. Dr. Robert Crain, a witness called by plaintiffs, criticized some of the assumptions and methodology employed by Dr. Armor in arriving at his conclusions. (T6 at 157-207)

71. Dr. Crain disagreed with Dr. Armor's use of first grade test scores as predictors of student achievement entering first grade because the tests are given in the spring rather than in the fall. (T6 at 162-63) However, Dr. Crain agreed that a

---

[47]First grade test scores are used as a predictor of student achievement or skills before entering school. (T3 at 96) However, the tests are given in the spring of the school year rather than the fall and therefore are the product of the first grade curriculum to an extent. (T6 at 253; 283; T7 at 186-87)

student's entry-level skills are important predictors of how well a student will perform on the fourth and eighth grade tests. (T6 at 253-53)

72. Dr. Crain also disagreed with Dr. Armor's use of neighborhood data to determine the variables of family income and educational level of parents because that data reflected averages rather than actual figures for a neighborhood and therefore would presumably include both black and white families. (T6 at 168-73; 236) However, Dr. Crain uses neighborhood income in the studies he conducts. (***1323** T6 at 236) Dr.Crain also questioned whether family income and educational background could be remnants of the prior segregated school system. (T6 at 174-76)

73. Overall, Dr. Crain thought that Dr. Armor had overestimated the effects of socioeconomic factors on achievement test scores. (T6 at 192) Although he disagreed with some variables used by Dr. Armor, Dr. Crain did agree that the socioeconomic factors of free lunch and the number of parents at home were relevant and important variables. (T6 at 266) Using these factors, he obtained a line of regression similar to Dr. Armor's study. Dr. Crain did not determine the statistical significance of the differences between his study and Dr. Armor's. (T6 at 270)[48]

---

[48]Dr. Crain disagreed with Dr. Armor's use of a "two-tailed" statistical model and felt that he should have used a "single-tailed" analysis. (T6 at 274) His preference for the single-tailed analysis was that "no one . . . would expect blacks to score better in higher black schools." (T6 at 274) The reasons cited by Dr. Armor for use of the two-tailed analysis are more persuasive and refute Dr. Crain's assumption that black students in schools with a higher black enrollment will always score lower than those students in schools with a lower black enrollment. (T7 at 161-69)

74. Dr. Crain's study showed that fifth-grade black students attending schools that were at least 40% black performed deficiently when compared with their counterparts attending schools that were under 40% black. (T6 at 206-07) However, these differences occurred only with reading. There were no differences in math. (T6 at 281-82)

75. However, when Dr. Crain used the same variables as Dr. Armor, he reached substantially the same results. (T6 at 265-66)

Academic Outcome

76. To evaluate how well the school system is doing in educating high school students, Dr. Armor examined grade averages and college plans as no standardized tests are taken by twelfth graders. White students have a 2.9 grade average; black students have a 2.3 grade average. Fifty-six (56) percent of the high school seniors who were white planned to attend college as compared to 45% of black students. (DX 1 at 24-25, chart 54)

77. When adjustment is made for socioeconomic factors and tenth grade achievement tests, Dr. Armor concluded that the grade average gap for black and white seniors would be only about .15 grade point. (DX 1 at 25, chart 55) After adjusting for socioeconomic factors, the difference between black seniors and white seniors in terms of college plans is practically negligible. (DX 1 at 25, chart 55)

Gifted Programs

78. As of October 1996, approximately 75% of the students enrolled in Hillsborough County gifted programs were white and approximately 9% were black. The remaining 16% were from other minority groups: 11% Hispanic, 4% Asian, and Indian and multi-cultural, less than 1% each. (T2 at 151-

52) While the number of black students in the gifted program is disproportionate to the number of black students enrolled in public schools, students must both apply to the gifted program and meet minimum criteria including attainment of a minimum score on a standardized test.

79. Until 1991, admission into gifted programs was set by state standards requiring an IQ test of 130 or higher. That year, the state adopted a plan to increase the number of minority gifted students and invited school districts to submit alternate criteria for admission. Hillsborough County elected to participate and submitted criteria under this program (referred to as "Plan B") which included an IQ score of 115 or higher together with demonstrated academic achievement and other characteristics typical of gifted individuals. (T 153- 56)

80. Implemented in 1993, the "Plan B" program continues to this day. Dr. Stevens noted that the school district's implementation of "Plan B" had increased the proportion of black pupils in the gifted program. (PX 1 at 31)

81. Ronnie King, number two (2) in his class at Armwood High School, moved to Tampa from Colorado. He had been enrolled in gifted programs in Colorado. He *1324 missed a year of participation in gifted programs in seventh grade due to the transfer and having to be retested. His mother was later told that he did not need to be retested. Mr. King, who is African-American, was placed in gifted programs in the eighth grade and has participated in those programs since that time. (T6 at 43-55).

Dropout Rates

82. Defendants monitor dropout rates and have a program designed to minimize dropouts. In the elementary

schools, the program relies on enhancing reading, math, and skills development in small groups of students. (T7 at 206-07)

83. In the junior and middle schools, the School Board focuses on students who may be at risk of dropping out and provides those students with additional academic experiences with a low teacher to student ratio. At the senior high schools, defendants provide additional counselors and teachers in a graduation enhancement program. (T7 at 207)

84. Additionally, the School Board provides a monthly report of prospective dropouts to the principals of each school. The principals are expected to follow-up with each student on an individual basis to give specific suggestions on how to stay in school or participate in alternate programs such as the GED program or adult education which meets the needs of the student. (T7 at 207)

85. The dropout rates for Hillsborough County public schools are the lowest in the state for similar large urban school districts. In the past five (5) years, dropout rates have averaged about 3 1/2 %. (T7 at 208-09)

86. Dr. Armor examined data for the high school graduating class of 1995 beginning when those graduates were in the eighth grade. The difference in dropout rates for blacks (15%) and whites (9%) is not significant. When adjusted for socioeconomic factors, that difference is negligible. (DX 1 at 24, charts 52, 53)

Suspension Policies and Rates

87. The School Board also tracks suspensions and expulsions by sex, race, and age. The suspension rates for Hillsborough County are lower than state-wide averages in some areas and for some groups. (T7 at 234) The School

District has out-of-school suspension programs as well as seven (7) alternative school sites. Individual schools can elect to run an in-school suspension program; that decision is left up to the administration at each school. (T7 at 234-36)

88. Dr. Armor did not examine suspension rates, but Dr. Stevens did. After examining four (4) years of data (1990-1994), Dr. Stevens concluded that black students are suspended from school at disproportionately high rates. He found that in 1994-1995 the suspension rate for black students was two (2) to four (4) times higher than the rate for white students depending upon grade level and the type of suspension. This data did not lead Dr. Stevens to infer racial discrimination, however. His criticism was that the School Board had not examined this data more closely on a school-by-school basis "to verify that disparities are not race-related." (PX 1 at 29-30)

B. Faculty and Staff Assignments

Plaintiffs object to the Magistrate Judge's Recommendation that unitary status be declared with regards to faculty and staff assignments. Plaintiffs point out that the Court's July 2, 1971, Order provides:

> Principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. Such personnel shall be assigned so that the ratio of black to white teachers in each school, and ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

(July 2, 1971, Order at 10). Plaintiffs argue that the Order specifically contemplates the inclusion of faculty and staff in

the analysis and staff assignment is expressly listed as a Green factor. Plaintiffs assert that the evidence on staff which the Magistrate Judge deemed unreliable is a critical component of desegregation orders in general, and particularly, to the desegregation Order in this case.

Plaintiffs argue that, without exception, schools with higher percentages of black faculty ***1325** and staff, fall into one (1) of three (3) categories: (1) a high percentage of black student enrollment, (2) a historically black school prior to the 1971 Order, or (3) a school located in the inner city. *See* (PX 1i (Appendix to Pls. Proposed Findings of Fact and Conclusions of Law)). Plaintiffs emphasize that the schools deviate 10% or more from the district-wide faculty and staff average and many deviate by 15% or more.

Conversely, Defendants argue that the Court's 1971 desegregation Order, which dealt exclusively with student assignment, did not treat faculty and staff. Moreover, Defendants argue that when the Court ordered that, "[p]rincipals, teachers, teacher-aides and other staff . . . be assigned so that the ratio of black to white teachers in each school, and the ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system," the Court failed to provide a specific statistical variance which was to be used in assessing compliance with its directives. Defendants point out that, in the July 2, 1971, Order, the Court acknowledged that faculty desegregation had been accomplished in the 1970 school year and declined to continue the "detailed procedure" requested by Plaintiffs. (July 2, 1971, Order at 8). Nevertheless, the Court continued the requirement for faculty desegregation.

Defendants explain that they do not maintain data on faculty and staff broken down by certificated (teachers and other instructional staff) and non-certificated (aides) employees.

Defendants assert that the collection of data in this manner is entirely consistent with the Court's previous orders, which dealt with all "staff" who "work directly with children." Moreover, Defendants contend that, although the Court required that Defendants maintain faculties at each school which reflect the system-wide employment ratios and did not provide any specific level of hiring black teachers since the entry of the Court's 1971 Order, Defendants have attempted to meet a "self-imposed" goal of faculties which are 80% white and 20% black to reflect the system-wide race ratio of students in the system. (T2 at 106). Defendants admit that they have never met this goal; however, Defendants assert that they have made, and continue to make, efforts to meet the 20% goal.

The Court finds that Defendants have been complying in good faith with the Court's Orders and Defendants should continue their efforts until unitary status is declared. Among Defendants affirmative efforts are the adoption of the recommendations of the Minority Recruitment Task Force with regards to strategies and activities directed towards increasing the number of black teachers and administrators in the school system. (T2 at 107). Defendants have employed aggressive minority recruitment techniques which have been successful. *Id.* at 105-06. Defendants have also imposed certain restrictions on schools having less than 20% black faculties. For instance, the School Board prevents black teachers from moving away from a certain school when that teacher's presence is needed to maintain racial balance. In addition, the School Board prohibits a principal from hiring a white teacher at the imbalanced schools unless there are no suitable black candidates. (T2 at 115). The School Board imposes similar restrictions on black and white teachers with regards to transfers and reassignments. The School Board has been making administrative decisions solely based on the racial balance of the transferring and receiving schools.

Despite the inability of the parties to agree on a standard on which to base compliance, the Court finds that Defendants' 15% variance is useful. Although the Court commends Defendants efforts in this area, Defendants shall include staff assignments in their subsequent evaluations and provide evidence in this regard when unitary status is sought in the future. Moreover, the parties shall confer and endeavor to agree on a measurement to be used in subsequent submissions to the Court. Plaintiffs' objections to the Magistrate Judge's findings are overruled in all other respects.

C. Transportation

Plaintiffs object to the Magistrate Judge's findings concerning transportation of students in Hillsborough County because black students bear a disproportionate burden. Plaintiffs contend that, at the elementary *1326 school level, 23% of all black students and 10% of all white students are transported for desegregation purposes. (PX 1 at 20; PX 1f). At the middle school level, 26% of all black students and 18% of all white students of all white students are transported for desegregation purposes. *Id.* At the high school level, 24% of all black students and 8% of all white students are transported for desegregation purposes. *Id.* However, Plaintiffs concede that, to the extent busing is considered a burden on the student, these figures overstate the number of students bused for desegregation purposes because the figures include students who attend magnet schools and do so voluntarily. Nevertheless, Plaintiffs point out that black students are still more likely than whites to be assigned to a bus for desegregation purposes.

Plaintiffs argue that the issue of busing is directly linked to Defendants' student assignment and site selection policies. Particularly, Plaintiffs argue that, the perpetuation of the satellite program places a disproportionate transportation burden on black students who live in the satellite areas.

Moreover, Plaintiffs argue that the students who are bussed may be disadvantaged in terms of participation in extracurricular activities.

Conversely, Defendants argue that, in *Mannings v. Board of Public Instruction*, 427 F.2d 874 (5th Cir.1970) ("*Mannings III*"), the Fifth Circuit found that the transportation system in Hillsborough County had been desegregated by this Court's May 15, 1967, Order. *Id.* at 876. The Circuit Court directed this Court to supplement that earlier decree to include the specific requirements of *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir.1969). In *Singleton*, the Fifth Circuit required school districts subject to desegregation orders to regularly re-examine their transportation systems to insure the provision of such services in a "non-segregated and otherwise non-discriminatory fashion." *Id.* at 1218. This Court included this *Singleton* requirement in its July 2, 1971, Order.

Defendants point out that, despite the requirement of a non-discriminatory system, the Court did not impose any obligations on Defendants to monitor or ameliorate any busing "burden." Defendants emphasize that the desegregation plan actually imposed a greater transportation burden on black students because black schools were ordered closed or converted and by necessity, those children had to be transported elsewhere.

Plaintiffs raised this issue when Defendants initially proposed the desegregation plan and the Court addressed Plaintiffs' concerns. In the July 2, 1971, Order, the Court explained that implementing the desegregation plan would likely result in disproportionate busing of black students. However, the Court noted that, although proportionately more black students would be bused, the plan would result in the busing of fewer students overall, and that the alternative to the

plan--maintaining the formerly black schools--would require the transportation of large numbers of white students, with the possible result of " 'white flight' or 'black flight' or both."

The Court's orders have not been amended to deal with disproportionate burden on black students and Defendants cannot be charged with a duty that has never existed. Moreover, Plaintiffs agreed to the continuation of the transportation burden in the 1991 Consent Order. It would be unfair to require Defendants to monitor and /or account for the respective burdens associated with the transportation of students when such requirement was not a part of the desegregation order or subsequent orders. Furthermore, because Defendants must take whatever steps are necessary to affirmatively desegregate the schools to the maximum extent possible until unitary status is declared, specifically with regards to student assignments, the disproportionate burden will continue. Defendants shall continue to provide transportation on a non-discriminatory basis. Nevertheless, Defendants should continue to consider the burdens imposed by transporting all students when decisions are made regarding student assignments and site selection.[49] Plaintiffs' objections to the Magistrate ***1327** Judge's findings with regards to transportation are overruled.

D. Extracurricular Activities

Plaintiffs also object to the Magistrate Judge's finding that extracurricular activities provided in the Hillsborough

---

[49]Defendants must remain cognizant of the correlation between site selection and the burden imposed on black students. While Defendants have noted the intention to reduce busing, if not enough facilities are being built in the inner-cities, black children, in particular, will require continued busing. These types of choices should be discussed openly between the parties.

County school system are unitary. Primarily, Plaintiffs complain that Defendants fail to collect and maintain data as to each school in the system. Plaintiffs argue that, because Defendants have only provided evidence regarding athletics as opposed to all of the various other activities, there is insufficient information upon which to make a determination of unitary status.

There is no dispute that the Court did not impose any numerical or other requirements by race in connection with the participation of extracurricular activities. (T4 at 166-67). Defendants assert that, although they do not maintain data reflecting extracurricular participation by race by school, they do track participation in the district overall. The data compiled for 1995 reveals that black students made up 11% of the membership of national honor societies, 12% of drama clubs, 27% of student councils, 20% of marching bands, 21% of other bands, 14% of orchestras, and 19% of choral groups. (PX 1 at 27). The Court agrees with the Magistrate Judge that Defendants offer and maintain extracurricular activities on a non-segregated and otherwise nondiscriminatory basis. However, as Defendants aggressively employ desegregation techniques over the next few years, the Court expects that the representation of minorities in these various activities will continue to improve.

E. Resource Allocation

Plaintiffs argue that, overall, the data on resource allocation is so deficient that it is of little probative value. Plaintiffs assert that the data suffers from three (3) major deficiencies: (1) none of the data provided hereto is compared with information prior to the issuance of the 1971 Order; (2) only two (2) years of data are provided and not consecutive years; and (3) the analysis does not take into consideration the impact of the Middle School Plan. Plaintiffs argue that a

comparison of resources allocated prior to 1971 is necessary in order to properly evaluate the prior *de jure* segregated school system and the vestiges of that system that remains today. Moreover, Plaintiffs argue that two (2) years of data does not provide sufficient reliable information to evaluate. Finally, Plaintiffs contend that, because the Middle School Plan involves a tremendous overhaul of the entire school system, the two (2) years of data used by Defendants is unreliable.

In addition, Plaintiffs argue that the teachers' resource information does not convey an accurate picture. Plaintiffs point out that the teachers' resource information includes resources, provided as a result of Chapter I funds. Chapter I funds provide significant resources based on the socioeconomic status of the students. (T7 at 93-95). As a result, Plaintiffs argue that, the inclusion of these Chapter I funds without indicating how this support affects the amount of resources can be misleading. Therefore, according to Plaintiffs, this is not a reliable indicator of how the school district actually distributes its resources.

Furthermore, Plaintiffs explain that the operational analysis includes information on teacher salaries and benefits, textbooks, instructional equipment, maintenance, and other categories. *See* (DX1 at 16-19). However, Plaintiffs assert that, because only two (2) years of data were provided, a dozen schools were excluded from the analysis on supplies and equipment expenditures. As a result, Plaintiffs assert that Defendants' data is unreliable.

Conversely, Defendants argue that the analysis provided by Dr. Armor is sufficient. Dr. Armor compared the allocation of teacher resources between schools having black enrollments greater than 40% and schools having black enrollments less than 40%. Defendants explain that the availability and distribution of funds is controlled to a large extent by state law

and/or administrative regulation. The funds needed to operate the schools come from three (3) sources: (1) the federal government; (2) the State of Florida; and (3) local revenues. Defendants contend that, with regards to operations, the state money received by Defendants is distributed according to a weighted formula based on the numbers and educational types of students ***1328** enrolled during a given fiscal year. (T1 at 186). Defendants emphasize that both the state and federal governments audit Defendants to ensure that funds provided to the Hillsborough County schools are expended for the activities and programs for which they are provided and on an equitable basis. (T1 at 190-91; 195-96).

Defendants point out that the sample which was used demonstrates that the allocation of resources and expenditures was comparable for all schools regardless of whether the school was greater than or less than 40% black. With regards to teacher resources, Dr. Armor focused on expenditures for instructional salaries, instructional supplies, and for all purposes. (DX1 at 16-19). In the 1992-1993 school year, per capita expenditures for instructional salaries for elementary schools which had black enrollments in excess of 40% were slightly lower than expenditures for other schools. However, these expenditures were slightly higher for junior high schools which had black enrollments of 40% or higher. (DX1, Chart 37). For the 1994-1995 school year, the expenditures were slightly higher at schools with black enrollments below 40% than schools with black enrollments exceeding 40%; however, the differences were not remarkable. (DX1, Chart 40).

In the area of expenditures for instructional supplies and equipment, the evidence showed that these expenditures were slightly higher for elementary and junior high schools with black enrollments below 40% for both years examined. (DX1, Charts 38, 41). Defendants maintain that these differences were attributed to conversion funds distributed to schools which were

newly constructed or reconfigured pursuant to the Middle School Plan. Defendants assert that most schools with 40% or more black enrollments were not scheduled for conversion until the 1996-1997 and 1997-1998 school years; therefore, the amounts distributed will be similar upon their conversion.

Moreover, according to Defendants, all of the resources with regards to instructional supplies and equipment are distributed on a per pupil basis to all schools, based on programmatic needs. (T7 at 192-95). Defendants explain that the only exception to this method of distribution is that schools which are converted to different grade configurations pursuant to the Middle School Plan are afforded additional monies, which while computed on a per pupil basis, are only available to those schools undergoing conversion. (T7 193-94).

Furthermore, with regards to total per capita expenditures, Defendants' analysis showed that in the 1992-1993 school year, the expenditures were very similar for elementary schools, regardless of racial composition, and expenditures were higher in the junior high schools which were 40% or more black. (DX 1, Chart 39). In the 1993-1994 school year, elementary schools that were over 40% black received higher per capita distributions, while junior high schools were nearly identical, regardless of racial compositions. (DX1, Chart 42).

Dr. Armor also reviewed capital expenditures on a five (5) year basis (1991 to 1995) because capital expenditures are "one-time costs, spread over two or more years." (DX 1 at 19). The expenditures were examined on a per school basis, comparing expenditures on inner city schools, which were comprised of the highest concentration of black students, with other schools. The analysis demonstrated that expenditures on inner city schools exceeded those on other schools. (DX 1, Chart 43).

Furthermore, Defendants explained that in addition to monies received from state and local sources, schools having certain levels of students receiving free and reduced lunches are eligible for federal monies, which may be used only at qualifying schools. (T7 at 93-96); (DX 37); (T1 at 190-91). These qualifying schools include many of the over 40% black schools. Defendants stress that this additional money is used to reduce class sizes and/or provide additional social and psychological services, as determined by the individual schools. (T7 at 95).

Defendants' distribution of teacher and financial resources reveals no pattern of discrimination and Plaintiffs' objections are overruled thereto. However, as the School Board continues to implement the Middle School Plan and to make adjustments pursuant to this Order, the School Board shall continue to evaluate its resource allocations. ***1329** Moreover, the School Board should provide Plaintiffs with records of resource allocations for each year following this Order until unitary status is declared. The parties shall confer and attempt to agree on the substance and format of those records.

F. Facilities

Plaintiffs object to the Magistrate Judge's determination that the school system is unitary with respect to facilities. Plaintiffs assert that "[D]efendants' site selection policies and practices suggest that the placement and construction of new facilities have exacerbated racial identifiability." (Br. in Supp. of Pls.' Obj. to R & R at 32). Plaintiffs contend that Defendants failed to provide any documentation concerning: (1) the reasons a particular school site was selected; (2) a summary analysis of the impact of a selected site on desegregation; (3) alternative sites which were considered and rejected; and (4) the reason for rejecting an alternative site, including consideration of the alternative sites' impact on desegregation.

Plaintiffs contend that it is clear from Defendants' own data that they did not address racial identifiability when schools were opened and closed. For example, Plaintiffs point out that, from 1977 through 1995, twenty-four (24) elementary schools were opened and eight (8) elementary schools were closed. During this period, there were fourteen (14) racially identifiable schools which had black populations of 40% or more. (PX1 at 8). Plaintiffs emphasize that, despite the opening and closing of several elementary schools over the years, none of the fourteen (14) racially identifiable schools were further desegregated by Defendants' decisions. Plaintiffs argue that, Defendants have not merely lost desegregation opportunities, but have actively promoted segregation in the community.

Conversely, Defendants assert that they have taken care to ensure that their actions in site selection and school construction do not cause a return to a dual system. Defendants emphasize that the School Board has not built any new schools since 1971 which entailed an all-white or majority black enrollment. Moreover, Defendants maintain that, despite the fact that most of the new construction has taken place in the suburbs, the School Board has also expended a substantial portion of its capital funds on construction and remodeling projects for inner city schools, some of which have opened as magnet schools to foster desegregation.

There is no question that the location of new schools has an immense impact on the community as a whole. The Supreme Court has repeatedly articulated the import of such decisions.

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of population growth, finances, land values, site availability, through an

> almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

Swann, 402 U.S. at 20-21, 91 S. Ct. 1267.

As discussed above, Defendants have failed to aggressively combat segregation. Unfortunately, Defendants' shortcomings with regards to student assignments may have contributed to the fact that more schools are needed in the predominately white suburbs. Undoubtedly, it is impossible to determine the precise effects of the School Boards' decisions over the past twenty-seven (27) years on the residential patterns in Hillsborough County. However, Defendants' lack of good faith commitment over the years, in conjunction with Defendants' decisions to build the majority of new schools in the areas of white suburban expansion farthest from the areas with concentrated black populations, causes this Court concern. Moreover, Defendants' position that they were not required to take affirmative action, once the initial system of ***1330** nondiscriminatory attendance patterns was implemented, undermines their contentions that they have not contributed to the racial identifiability of Hillsborough County schools.

Nevertheless, the Court finds that Defendants' evidence demonstrates that the opening and closing of schools has generally maintained or improved racial balance. *See* (DX 3

and DX 4). While the Court expects additional documentation to be provided on this subject when unitary status is considered in the future, the Court is not inclined to become further entangled in the complex educational policies involved in new school construction and school abandonment decisions.[50] Instead, the Court will afford Defendants the opportunity to demonstrate that state-imposed segregation no longer exists.

In addition, the parties addressed the issues concerning overcrowding. Plaintiffs argue that, not only has the School Board selected sites in predominately, if not exclusively, white neighborhoods, but there is evidence that schools which are twenty (20) percentage points above the district-wide black population are more likely to be overcrowded than any other Hillsborough County schools. However, as noted above, Plaintiffs' evidence regarding FISH capacities does not include portable classrooms; therefore, schools that exceed their FISH capacities are not necessarily overcrowded. Notwithstanding, the use of portable classrooms is relevant to the inquiry of the equality of school facilities. While a school may not be "overcrowded" because of the extensive use of portable classrooms, the fact that brand new schools are being built elsewhere should be evaluated. Defendants shall make this evaluation and demonstrate that new school construction decisions have taken into consideration the discrepancies

---

[50]The Court expects Defendants to provide Plaintiffs with sufficient information so that the decisions made by the School Board, with regard to construction and abandonment of schools, can be adequately evaluated. Plaintiffs have already articulated the documentation which they believe is necessary. However, since the parties will be working very closely to insure that a unitary school system is forthcoming, the Court finds it unnecessary, at this point, to define the parameters of the communication between the parties on this topic.

between the use of portable classrooms at racially balanced and unbalanced schools.

G. Quality of Education

With regard to quality of education, Plaintiffs argue that socioeconomic factors do not adequately explain the disparity in academic achievement levels among black and white students. Plaintiffs argue that Defendants' evidence is insufficient and the differences in achievement levels demonstrate vestiges of the prior *de jure* segregated schools system.

Significantly, the Court's orders contain no specified levels of student achievement, nor any standard to evaluate quality of education. To a large extent, the quality of education being provided in Hillsborough County must be scrutinized in connection with the other factors which the Court has previously reviewed, particularly in connection with the facilities provided and the allocation of resources. In addition, however, the parties have generally agreed on several areas of the Defendants' operations which should be addressed in regards to judging the equality of educational opportunity being afforded to students. These include dropout rates, suspension rates, gifted child education programs, and academic outcome.

As discussed above, Defendants need to evaluate certain facets of the school system with regards to the equality of facilities. Moreover, Defendants shall provide Plaintiffs with the documentation necessary so that productive discussions and negotiations between the parties can ensue. With regards to resource allocations, there is no indication that the Defendants have violated the Fourteenth Amendment and this area merely needs to be monitored by Defendants as they continue to implement the desegregation plan, as well as, the Middle School Plan. No further discussion is required on these issues.

(i) *Dropout Rates*

Both Dr. Armor and Dr. Stevens addressed dropout rates at the evidentiary hearing. Although Plaintiffs did not present *1331 any independent evidence on the subject, they take issue with analyses conducted by Dr. Armor relating to academic outcomes, but not to the use of that factor. Dr. Stevens notes that black students drop out of school at rates disproportionate to their presence in the general student population. (PX 1 at 31-32). Similar to the issues concerning suspensions, Dr. Stevens does not allege a discriminatory basis for this result, but calls for increased monitoring, and, a different method of record keeping. *Id.* at 32.

Significantly, Defendants monitor dropout rates, and they maintain a program designed to reduce the number of dropouts, without regard to race. That program is multifaceted, including several components. One is the Personalized Education Program ("PEP"), which is based in the elementary schools, and focuses on academic interventions in the areas of reading, math, and skills development. (T7 at 206-07). In middle and junior high schools, Defendants endeavor to predict which students are at risk of dropping out and again focus on academic skills by using teachers with lower pupil to teacher ratios. (T7 at 207). Additional counselors and teachers are provided at senior high schools. *Id.* Moreover, prospective dropouts are assigned either on a voluntary basis or by administrative action to alternative schools. *Id.* As with suspensions, the defendants monitor dropouts and report them monthly to principals, with the expectation that they will follow up as part of a "dropout retrieval program." *Id.* As a result of these efforts, Defendants' dropout rates are the lowest in the state for districts of its size. (T7 at 208-09).

Dr. Armor presented an analysis of the differences in dropout rates between black and white students. Under this

analysis, and after controlling for the socioeconomic status ("SES") factors of free lunch eligibility and family structure, virtually all of the gap between black and white statistics is explained. (DX 1 at 24 and Chart 54). Even if adult education students are included within the dropout statistics, nearly three-fourths of the difference is explained, and the predicted difference between black and white rates is 3%. *Id.* Plaintiffs' objections to the Magistrate Judge's findings are overruled.

(ii) *Suspensions*

With regards to student suspensions, Dr. Stevens notes that black students are suspended from school for disciplinary purposes at a rate which is disproportionate to their presence in the school population. Dr. Stevens also notes that the rate of suspension was two (2) to four (4) times as high for black students as for whites from 1991 to 1994. However Plaintiffs do not cite these statistics as necessitating a conclusion that racial discrimination has occurred. Indeed, Dr. Stevens testified that they are not unusual. (T4 at 145). Nevertheless, he expressed concern over the obvious fact that a suspension deprives the disciplined student of the educational opportunities which are provided during the term of the suspension. (T4 at 145-46). Additionally, Dr. Stevens suggested that the data demonstrates the need for further analysis by Defendants to ensure that they do not result from discriminatory treatment. (PX 1 at 29-30).

Defendants have been monitoring the suspension rates in Hillsborough County. In fact, the data relied upon by Dr. Stevens was collected by Defendants, who track suspensions and expulsions, by sex, race, and age. (T7 at 234). The suspension rates in Hillsborough County are slightly below State of Florida averages "for some groups." *Id.* Significantly, there is no evidence to suggest that the disproportionate

suspension rates are the result of discrimination by Defendants. Consequently, Plaintiffs' objections in this regard are overruled.

(iii) *Gifted Program*

In addition, both parties agree that gifted child education should be reviewed as well. As discussed below, Defendants implemented a program ("Plan B") in 1993 to facilitate admission of disadvantaged students to the gifted programs. *See* (T2 at 151). The standard for admission to gifted programs offered by the Defendants is a tested IQ of at least 130. This requirement is set by the State of Florida for that part of the program and is referred to as "Plan A." (T2 at 153). Previously, Defendants could not deviate from this prerequisite. (T2 at 155-56). However, in 1991, the State allowed school ***1332** districts to formulate plans for "Plan B," which was designed to facilitate admission of disadvantaged students to the gifted programs. (T2- 151). Participation in Plan B is voluntary. (T2-153). Defendants elected to participate in Plan B as soon as it was allowed, completing their plan and obtaining state approval in 1993. (T2-151). Plan B allows students with an IQ of 115, demonstrated academic achievement, and certain personal characteristics to be admitted to the same program in which those with the higher IQ are enrolled. (T2 at 154). Nevertheless, prior to Plan B, the State standard for gifted class admissions was applied without regard to the race of the student. (T2 at 156-57).

As of October 1996, gifted programs in Hillsborough County included 8,219 white students (74.5%), 1,015 black students (9.2%), 1,249 Hispanic students (11.3%), 481 Asian students (4.0%), 71 Indian students (less than 1%), and 27 multi cultural students (less than 1%). (T2 at 151-52). Dr. Stevens notes that while black enrollment district-wide is 23%, black students constitute only 9% of those children enrolled in the Defendants' gifted education programs. (PX1 at 30).

Moreover, Dr. Stevens reported that 9.2% of all white children have been assessed as gifted, whereas, only 2.9% of the black students in the county have been so classified. (PX 1 at 30). Dr. Stevens emphasized that white students are three (3) times more likely than black students to be identified as gifted. *Id.* Significantly, Dr. Stevens admitted that these figures do not evidence racial discrimination, however, he does suggest increased scrutiny. The Court agrees that there is no indication that student placement is connected to race, and, consequently, Plaintiffs' objections to the Magistrate Judge's findings with regards to the School Board's gifted programs are overruled.

(iv) *Academic Outcome*

Dr. Armor examined several factors relating to academic outcomes, including achievement test scores, outcomes for seniors, and school effects. Data relating to Hillsborough County students demonstrates that there are differences between the achievement test scores of black students and their white counterparts. However, these results are not unique to Defendants' school system. Nationally, achievement gaps between students of the two (2) races range from two-thirds to four-fifths of a standard deviation, depending on the test in question and the grade level of the students taking it. (DX 1 at 21).

The results of tests administered to fifth grade students in Hillsborough County in 1994 and 1995 produced a gap of 16 to 17 points between black and white students. This difference represents approximately three-fourths of a standard deviation, which is consistent with the national statistics cited by Dr. Armor. (DX 1 at 22). In addition, Dr. Armor analyzed the data just- described, and controlled for certain SES factors. The particular factors which Dr. Armor used were poverty level (using free lunch eligibility), number of parents in the household, average income, and parent education level. When

he performed this analysis on the fifth grade students who took the tests in 1995, controlling for the identified SES measures, 60% of the gap between the races was explained. (DX 1 at 23 and Chart 46). Dr. Armor also controlled for SES factors while adding the test takers' first grade reading test results as a proxy for the level of preparedness of students upon beginning their schooling. He was able to explain some 90% of the gap between the scores of whites and blacks using this analysis. (DX 1 at Chart 47).

Using the same methods for the 1994 school year, Dr. Armor obtained similar results. (DX 1 at Charts 48 and 49). In Dr. Armor's opinion, these findings show that race does not predict lower achievement test results for black Hillsborough County students. However, Plaintiffs' expert, Dr. Robert Crain, took exception with Dr. Armor's analysis. Nevertheless, when Dr. Crain used the same control factors as Dr. Armor, his results were substantially similar. (T6 at 265-66).

Dr. Crain questioned Dr. Armor's use of first grade reading scores, and the source of other factors Armor used. In his initial report, Dr. Crain questioned Defendants' use of first grade reading scores on the basis of their "notorious" unreliability. (PX 3 at 1). At the hearing, however, Dr. Crain did not ***1333** rely on this criticism, focusing instead on the impropriety of these scores as a control because they do not demonstrate initial skills prior to schooling. (T6 at 162-63). Notwithstanding, Dr. Crain conceded that a child's characteristics at the beginning of his or her education do affect performance. (T6 at 243-44). Dr. Crain performed an analysis using only the variables of free lunch and two (2) parents. (T6 at 266). This study produced a predictive line of regression which is parallel to that of Dr. Armor's study, indicating a similar effect. Although Dr. Crain conducted this analysis, he did not produce these results for the Court. *Id.* Neither did he

test the statistical significance of any differences between his analysis and that of Dr. Armor. (T6 at 270).

Although Dr. Crain's concerns are understandable, he has not provided a rational basis for rejecting Dr. Armor's analysis. The use of neighborhood data could be replaced only through individual surveys of each family. While the factors used by Dr. Armor might themselves be affected by race, Dr. Crain does not explain how this possibility is any more impairing when using income, the use of which Dr. Crain criticizes, than for poverty, the use which he does not criticize.

Dr. Crain also objected to Dr. Armor's use of a single model, combining black and white students, believing that separate models were more appropriate. (T6 at 176-77). Dr. Armor testified that earlier studies used two models based on differences in the educational outcomes of the two (2) races, but more recent studies have not disclosed such a difference and therefore rely on single models. (T7 at 182-84). Significantly, Dr. Crain's two (2) models did not produce different results.

Dr. Armor also examined reading achievement of black students based on the racial makeup of their schools. (DX 1 at 26 and Chart 56). Dr. Armor found that a gap between these students and their white counterparts existed, even when the black children attended schools which were less than 40% black. Dr. Armor's analysis also found that black students who attended such schools scored two (2) points lower than black students at schools with over 40% black populations. However, when the analysis controlled for SES variables, the gap disappeared. *Id.*

Dr. Crain criticized these portions of Dr. Armor's findings as well, but this was based on his use of a different type of statistical analysis, described as a "one-tailed test." Ordinarily, a "two-tailed test" is used to analyze a sample of

data. The tails refer to the two halves of a bell curve which predict the outcomes of the test. A one-tailed test eliminates all outcomes which fall in one half of that curve. Dr. Crain admitted that the use of the one-tail model is allowable only when the tester has an independent basis for predicting outcomes. (T6 at 273).

In this case, Dr. Crain justified the use of that model by stating that "no one in his right mind" would expect a black child to perform better academically in a school which is more than 40% black. (T6 at 274). Significantly, Dr. Crain did not provide any basis for this belief; therefore, there is no basis for using the one-tailed analysis. Dr. Armor testified to studies showing that blacks can, in fact, perform better academically in an all-black school when compared with their integrated counterparts. (T7 at 161- 62). Indeed, within the "tail" which Dr. Crain eliminated from his analysis, were examples of black children who outperformed their counterparts in schools with lower black populations. Robles, which has the highest percentage of black students, falls exactly where statistically predicted. (T7 at 165). Interestingly, Dr. Crain testified that, even using the one-tail model, he found no difference between student achievement on math tests by fifth graders who attended schools that were more than 40% black. (T6 at 281-82). Clearly, Plaintiffs' argument that there is a possibility of race-based differences between the quality of education Defendants provide to black students in reading, but not in math, is illogical.

Defendants have tracked the educational achievement of its students, by race, on several occasions over the last nineteen (19) years, and continue to do so. (T2 at 147). Black students in Hillsborough County outperform black counterparts nationally and in the State of Florida on Scholastic Assessment Tests taken by 47% of all seniors. (T2 ***1334** at 141). Black students in the county also outperform other black students in

the State on the standardized test required for graduation. *Id.* Additionally, Defendants have performed their own analysis of the impact of attendance at the over 40% black schools upon black achievement. After controlling for SES variables, no impact was found, which result was consistent with Dr. Armor's analysis. (T2 at 143).

The Court finds that the educational programs in Hillsborough County are provided on a fair and equal basis to students of all races. Although some differences in academic performance exist between black and white students depending on their race, these differences are the result of socioeconomic factors unrelated to the schools. While this discrepancy is unfortunate, it is not the result of segregation nor evidence of vestiges of a prior *de jure* system. In *Swann*, the Supreme Court articulated the limitations of the courts' remedies.

> We are concerned in these cases with the elimination of discrimination inherent in the dual school systems, not the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the [desegregation cases] was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage.

Swann, 402 U.S. at 22-23, 91 S. Ct. 1267. Plaintiffs' objections with regards to the quality of education provided by Defendants are overruled.

III. Conclusion

"[T]he court's end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." *Freeman*, 503 U.S. at 489, 112 S. Ct. 1430. The Court does not wish to supervise the School Board any longer; however, supervision remains necessary. The Court believes that this case is nearing its completion, but there is more work to be done. Nevertheless, the Court anticipates that "unitary status" will be achieved over the next few years.

Contrary to the parties' submissions, they are not as divided and polarized as it appears. Unfortunately, the inherent nature of the adversarial process encourages litigants to emphasize and accentuate their differences. Notwithstanding, the parties should be able to work together to achieve unitary status within a few years. Significantly, the 2000 census will soon be available to the parties which will provide updated data which will add to the understanding of the circumstances in Hillsborough County, specifically with regards to the Middle School Plan being implemented.

Unitary status is not a concrete concept and involves management of innumerable issues. It is not always black and white. One non-quantitative factor of particular significance is whether the School Board has sufficiently demonstrated good faith compliance with regards to both the operation of the educational system in general and the implementation of the Court's desegregation orders. At this point, Defendants have failed to show that further oversight is no longer necessary to avoid an imminent return to the unconstitutional conditions that led to the Court's intervention.

As discussed above, the Court finds that Defendants have failed to demonstrate a good faith commitment to the Court's desegregation orders. Unfortunately, this lack of good faith taints the analysis of the other facets of the school district's

operations. Because some of the schools in the system are racially identifiable, there is a presumption that the racial identifiability is traceable to the prior *de jure* system. Because Defendants have not fully embraced their affirmative duty, Defendants have not desegregated the school district to the maximum extent practicable. The relevance of good faith is that it conveys the notion that unitariness is less of a quantifiable moment in the history of a desegregation plan than it is the general state of successful desegregation. With each instance of a failure or refusal to fulfill their affirmative duty, Defendants have continued to violate the Fourteenth Amendment. As a ***1335** result, the Court is compelled to retain jurisdiction.

It is very difficult in a case such as this to categorize different aspects of the school system and declare individual areas unitary. Especially because the Court is convinced that Defendants' failure to demonstrate a good faith commitment has continued the constitutional violation and has diminished the availability of effective remedies. Clearly, Defendants need to address the issue of student assignments. Because of the passage of time and the construction and abandonment of schools, there are limitations on what can be accomplished. Nevertheless, Defendants have various desegregative techniques available and have the benefit of evaluating the techniques employed in other school districts. The School Board should not have to be told what to do at every turn; Defendants must be willing to take the reins. The School Board should initiate affirmative desegregation policies and practices to demonstrate that supervision by the Court can cease. By working with Plaintiffs to achieve unitary status, the parties can avoid unnecessary polarization and accomplish the task at hand relatively quickly.

After evaluating the voluminous record in this case, the Court is convinced that Defendants have a short road to travel.

Essentially, Defendants need to demonstrate that they are willing to aggressively desegregate the school district to the maximum extent practicable. Defendants should evaluate desegregation tools that have been successful in other districts and determine whether they can be effectively employed in this school district. Secondly, Defendants need to provide Plaintiffs with the necessary documentation so that Plaintiffs can conduct independent analysis and provide input with regards to desegregating the district. While Defendants are not bound to implement any policies or procedures that Plaintiffs may recommend, the insight into Plaintiffs' perspectives will prove to be invaluable. Moreover, Defendants should document and chronologize the affirmative steps taken from the date of this Order.

The school district has changed a great deal since this suit was filed. Hillsborough County enjoys a diverse population which includes people of every race and national origin. The concept of unitary status should likewise account for the change in Hillsborough County's change in demography. Neither the county nor the concept of unitariness can be confined to black and white issues. It is questionable whether the 80/20 ratio remains as an appropriate a starting point. For instance, in 1990, approximately 14% of the school-aged population was considered to be of Spanish descent. (DX 2 table 1). Moreover, approximately 5% were classified as "other." *Id.* However, the parties failed to address these significant variables. Defendants bear the burden of proof. Accordingly, it is

ORDERED that the Magistrate Judge's Report and Recommendation (Docket No. 809) be adopted in part and rejected in part; Defendants have failed to prove that the racial imbalances in the school system are not traceable, in a proximate way, to vestiges of past discrimination; Defendants have failed to demonstrate a good faith commitment to this Court's desegregation orders; the Hillsborough County public

school system is not unitary; Defendants remain subject to the Court's 1971 desegregation Order and the 1991 Consent Order; Defendants shall discharge their duties consistent with this Order; Plaintiffs' Motion to Enforce (Docket No. 753) is DENIED as moot; and jurisdiction is retained.

Report and Recommendation of Magistrate Judge
August 26, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANDREW L. MANNING, et al.,

Plaintiffs,

v. **Case No. 58-3554-CIV-T-17C**

THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly BOARD OF PUBLIC INSTRUCTION OF HILLSBOROUGH COUNTY, FLORIDA), et al.

Defendants.
_____/

REPORT AND RECOMMENDATION

Before the Court is the issue of whether the public school system of Hillsborough County has attained unitary status and should be released from court supervision. This issue has been referred to the undersigned Magistrate Judge for evidentiary hearing and a report and recommendation.

BACKGROUND

When this lawsuit was filed in 1958 on behalf of black school children, the public school system of Hillsborough County maintained racially segregated schools and black and white pupils were not permitted to attend the same schools. During the next thirteen years various methods were employed

to desegregate the schools, at the Court's direction, and appeals from those orders consumed much of that time.

In May 1971 the Court found that these methods had failed to desegregate the schools and ordered the School Board to immediately implement a plan to bring the school system in compliance with the Constitution. Since July 1971, the Hillsborough County School Board ("School Board") has operated under this Court's desegregation orders. The desegregation plan implemented by defendants and approved by the court and plaintiffs shifted focus in 1991 when the School Board adopted a middle school plan and the Court, with the consent of the parties, entered a Consent Order which modified the 1971 Order particularly as to student assignments within a group or "cluster" of schools.

In 1994, plaintiffs filed a motion contending that defendants had violated the terms of the July 1971 Order and 1991 Consent order by allowing certain schools to become "racially identifiable." The motion was referred for a report and recommendation. Following an evidentiary hearing, the undersigned Magistrate Judge recommended denial of plaintiffs' motion to enforce court order for failure to establish a violation of the Court's orders.

On November 17, 1995, this Court deferred ruling on the report and recommendation, noting that the dispute involved in plaintiffs' motion to enforce focused on student assignment. The Court found that the parties' discussion of the issue "demonstrates the need to expand the scope of the inquiry to a full fledged determination of whether the Hillsborough county school system has in fact achieved unitary status." (Order Recommitting Matter to Magistrate, Dkt. 709, at 3) ("Order of Referral") The Court ordered:

> a showing by Defendants as to whether they have complied with this Court's 1971 Order regarding the factors set forth by the United States Supreme Court in Green v. New Kent County School Bd., 391 U.S. 430 (1968). In addition to student assignments, Green ;and Freeman require that faculty and staff assignments, transportation, extracuricular activities, facilities and resource allocation all be free from racial discrimination. In each of these areas, the school board bears the burden of showing that any current imbalance is not raceable, in a proximate way, to the prior constitutional violation of the of Plaintiffs' rights. Freeman, 503 U.S. at 494. The quality of education being received by all students and the good faith commitment by the School Board must be shown.

Following the referral order, the undersigned Magistrate Judge set a hearing on the unitary status determination and thereafter conducted monthly status conferences with counsel for the parties. The parties exchanged discovery and retained expert witnesses.

After the evidentiary hearing was transcribed, the parties filed proposed findings of fact and conclusions of law (Dkts. 796 and 797) which were supplemented after the filing of the 6th Annual Report to the Consent Order. (Dkts. 803 and 805) Closing arguments were presented on May 22, 1997.

For the following reasons, it is recommended that this Court find that the public school system of Hillsborough County has attained unitary status in that defendants have eliminated, to the extent practicable, the vestiges of the prior de jure segregated school system and have complied in good faith with this Court's orders.

Pursuant to the referral order, the following proposed findings of fact and conclusions of law are submitted[1].

FINDINGS OF FACT

1. This action was filed on December 12, 1958 on behalf of plaintiff Andrew Manning[2].

2. The Court initially dismissed the complaint for the plaintiffs' failure to exhaust administrative remedies, but the dismissal was reversed by the court of appeals, which remanded the case for further proceedings. See Mannings v Board of Public Instruction, 277 F.2d 370, 375 (5th Cir. 1960) ("Mannings I").

3. Following remand, the Court conducted a non-jury trial, after which, on August 21, 1962, the Court entered an order finding that the defendants were in fact maintaining an unlawfully segregated system of public schools. To remedy the violation, the Court enjoined the defendants from operating a racially discriminatory school system and allowed them until October 30, 1962, in which to file a comprehensive plan for the desegregation of the schools.

4. For approximately the next nine and one-half years, this Court issued various orders and the School Board devised

---

[1]Some of the findings set forth in this Report and Recommendation have been stipulated bo by the parties (Dkt. 767) or are taken from the prior Report and Recommendation ("Prior R and R") dated June 23, 1995 (Dkt. 699) which addressed plaintiffs' Amended Motion to Enforce Court Order (Dkts. 601, 602). Record cities are not provided for stipulations.

[2]At the unitary status hearing, Mr. Manning revealed that his name had been misspelled as "Mannings" in court documents.

various desegregation Hillsborough County's schools. See Mannings v. Board of Public Instruction of Hillsborough County, 306 F. Supp. 497 (M.D. Fla. 1969) ("Mannings II"), rev'd, Mannings v. Board of Public Information, 427 F. 2d 874, 875, (5th Cir. 1970) ("Mannings III").

5. On May 11, 1971, the Court entered an order directing the School board to prepare and implement a comprehensive plan for desegregating the Hillsborough County School system. (May 1971 Order, Dkt. 636 at 43) (hereafter "May 1971 order").

6. The Court's May 1971 Order (at 43-44) directed that:

> (a) The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.
>
> (b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

7. On July 2, 1971, this Court approved for implementation the plan of desegregation developed and submitted by the School Board (hereafter "July 1971 Order") In the July 1971 Order, the Court expressly retained jurisdiction "for such further action as may be necessary and required."

8. The 1971 plan was designed to desegregate student enrollment in grades 1-12, as required by the Court; it did not include kindergarten classes, to which students continue to be

assigned on a neighborhood basis, nor did it include pre-school (early childhood education) classes.

9. The 1971 plan required the conversion of twelve formerly all-black elementary schools in the "inner city" area of Tampa[3] to single-grade attendance centers serving the 6th grade.

10. Under the 1971 plan, each elementary grade-level (1-5) attendance area of each of these formerly all-black elementary schools was subdivided into between two and five "satellite areas"; students residing in each of these "satellite areas"[4] were assigned to attend a formerly white school, to which they were transported for grades 1-5.

11. Under the 1971 plan, Lee Elementary School was to serve grades 1-5. The attendance area established for Lee Elementary School in the 1971 plan was not modified by the School Board prior to the 1975-1976 school year.

12. On January 14, 1975, this Court entered an Order which recited that:

> The latest of [the annual enrollment] reports was filed with the Court December 10, 1974. It indicates that because of changes therein there is a need for, and the

---

[3]Bryan, Carver, College Hill, Cuesta, Dunbar, Jackson Heights, Lomax, Meacham, Orange Grove, Potter, Shore and Williams.

[4]A satellite zone is an area which is not contiguous with the main attendance zone for a school. May 11, 1971 Order, p. 29, n.41. Thus, the references throughout the record to a satellite denotes a group of students within a given geographic area in a school boundary zone who are transported or assigned to a school outside the boundary zone primarily for desegregation purposes.

> Board is directed to file with the Court on or before March 21, 1975, a supplemental plan designed to insure that the requirements of the Court's previous orders insofar as they relate to Lee Elementary School will be complied with as of the beginning of the 1975-76 school year.

13. The Court also directed the defendants' attention to Cleveland, DeSoto, and Gary Elementary Schools "in the event changes for other schools are required . . . ." Edison Elementary, which was 41% black at that time, was not mentioned.

14. On March 21, 1975, the School Board submitted to this Court a supplemental plan. This plan proposed to convert Lee to a 6th-grade center replacing the Meacham facility and to reassign the former attendance area of the Lee School under the 1971 plan among seven different elementary schools for grades 1-5. The plan also projected racial enrollments for Cleveland, DeSoto, and Gary Elementary.

15. This Court, by Order of June 3, 1975, directed implementation of the supplemental plan for Lee Elementary School commencing with the 1975-76 school year.

16. The 1975 annual report filed by the defendants reflected no majority black schools. Five out of 128 schools had black student enrollments of 40% or more--Cleveland, Edison, Gary, Graham, and Palm River Elementary. (DX 7) Neither the Court nor the plaintiffs took any action as a result of those racial enrollments.

17. The following year, Cleveland experienced an increase to 55% black enrollment. (DX 7)

18. At least since January 14, 1975, the Court has not directed the School Board to prepare a supplemental plan or to

take any action with respect to the racial composition of any of its schools, including but not limited to schools whose enrollments were more than 50% black.

19. Subsequent annual reports filed by the defendants reflected increased black enrollment at several schools. These reports were served upon the plaintiffs each year. No motion seeking relief or enforcement of any obligation imposed by the Court was ever filed by the plaintiffs until June 1994.

20. The 1993 annual report for the 151 schools operated by defendants indicated that there were nine elementary schools and one junior high school with black student enrollments of 50% or more;[5] there were five elementary schools and two junior high schools with black student enrollments of 40% or more.[6]

21. Each year following initial implementation of the 1971 plan, the School Board filed at least two reports with the Court, copies of which were served upon counsel for the plaintiffs. The first report (usually submitted in the fall) provided enrollments (by race and grade) and faculty assignments (by race) at each school facility operated for grades 1-12 in the system. The second report enumerated changes in student assignment (if any) proposed to become effective in the following school year.

---

[5]The elementary schools were Cleveland (59%), Edison (74%), Foster (57%), Graham (63%), Meacham (50%), Oak Park (66%), Robles (90%), Sulphur Springs (70%), and Witter (56%). The junior high school was Van Buren (50%).

[6]The elementary schools were Cahoon (47%), Clair Mel (48%), DeSoto (40%), Shaw (48%), and West Tampa (41%). The junior high schools were Dowdell (46%) and Sligh (43%).

22. The reports of proposed student assignment modifications included, but were not limited to, boundary changes in response to overcrowding and student assignment modifications necessitated by the construction of new schools. The reports included projections of anticipated enrollments, by race, at schools affected by the proposed changes.

23. At least since January 14, 1975, this Court has not directed the School Board to prepare a supplemental plan or to take any action with respect to the racial composition of any of its schools, including but not limited to those schools in which the percentage of black students attending those schools exceeded 50%.

24. For more than 22 years after the 1971 desegregation plan was implemented, plaintiffs filed no written objections with this Court concerning the actual or projected enrollments of any schools in Hillsborough County, including-schools whose enrollments were more than 50% black. In June 1994 plaintiffs filed their first written objections to projected racial enrollments for the 1994-95 school year.

25. Plaintiffs did object in 1980 (for reasons other than anticipated racial composition of enrollments) to the closing of George Washington Junior High School and Glover Elementary School, proposed actions which were approved by this Court after a hearing on plaintiffs' objections.

26. Plaintiffs also objected in 1990 (for reasons other than anticipated racial composition of enrollments) to the proposed conversion of the Blake 7th-grade center to a magnet high school, a proposal which this Court disapproved (without prejudice to its subsequent resubmission as part of a comprehensive restructuring plan) by Order of January 23, 1991.

27. In November 1989, Dr. Walter L. Sickles, then Superintendent, appointed a "Task Force to Modify Single Grade Centers" to investigate and make recommendations for reorganizing the Hillsborough County school system to establish middle schools consistent with the goal of retaining a desegregated school system.

28. Beginning in early 1991 a series of meetings was held between the Superintendent and other School Board representatives and plaintiffs' counsel and desegregation expert, Dr. Leonard Stevens. The purpose was to discuss the proposed middle school plan.

29. In early 1991, then-Assistant Superintendent James D. Randall had an initial meeting with counsel for plaintiffs. A more extensive meeting took place on March 15, 1991, attended by counsel for the parties, Superintendent Sickles, Mr. Randall and other staff members of the school district, as well as by plaintiffs' educational and desegregation consultant, Dr. Stevens.

30. On March 15, 1991 plaintiffs' representatives were furnished a copy of the "Proposed Cluster Plan," which described working concept of middle school reorganization then being considered by the Task Force.

31. Further meetings were held between May and July 1991 regarding the plan. Following the July 16, 1991 meeting, a formal report entitled "Middle School Task Force Report 3, July 1991," was submitted to and approved by the School Board and subsequently transmitted to plaintiffs' counsel on August 20, 1991.

32. The Middle School Task Force Report 3 was attached to and made a part of the Consent Decree executed by

counsel for the parties, which was approved and entered by this Court on October 24, 1991 as a Consent Order.

33. The "cluster plan" is currently beginning its sixth and final year of implementation. Of the 17 clusters, eleven have been implemented so far. There are six remaining clusters to be implemented at the beginning of the 1997-1998 school year.[7]

34. Prior to the Court's 1995 Order of Referral, the School Board had not requested a finding of partial or full unitary status by the Court and/or the vacating, in whole or in part, of the previous orders of the Court.

35. The Court has therefore not had occasion to make, nor has it made, a determination whether all vestiges of the prior racially discriminatory dual school system in Hillsborough County have been eliminated to the extent practicable.

STUDENT ASSIGNMENTS

Background

36. The Hillsborough County school system, one of the largest school districts in the country, enrolled approximately

---

[7]A more detailed description of the middle school plan and discussions between the parties concerning the proposed plan is contained in the Prior R and R at 29-31.

120,000 students in the 1995-1996 school year.[8] DX 7 at 28.[9]

37. As of October 30, 1995, there were a total of 148 public schools operated by the School Board: 108 elementary schools, 27 junior high (or middle) schools, and 15 senior high schools. 5th Annual Report, April 15, 1996 at 54-82.

38. There is no dispute that all of the schools in Hillsborough County were desegregated as of the 1971 - 1972 school year.

39. Plaintiffs acknowledge that most of the schools currently operated by defendants reflect the relative percentages of black and white residents in Hillsborough County. (Dkt. 796 at 12)

40. The controversy centers on what factors have caused some of the schools--particularly the elementary schools--to have an increasing number of black students enrolled over the years.

---

[8]Although the Court now has the benefit of the 6th Annual Report filed on April 15, 1997 providing data for the 1996-1997 school year, this data was not available for the most part at the October 1996 unitary status hearing. The 6th Annual Report is addressed in the parties'~supplemental submissions. (Dkts. 80, 805)

[9]9Reference to the parties' exhibits at the unitary status hearing are indicated by the letters "PX" or "DX" followed by the exhibit number. References to the seven-volume transcript are indicated by the letter "T" followed by the volume number and page number, e.g., T7 at 107.

41. None of the Court's prior orders have expressly or implicitly"[10] directed defendants to **maintain** a particular student race ratio at any school, or to take any action in response to increased black enrollments in the schools.

42. In determining the degree of racial imbalance in individual schools, both Dr. Stevens, plaintiffs' desegregation expert, as well as Dr. Armor, defendants' desegregation expert, applied a working definition of plus or minus 20 basis points over the district-wide race ratios, using the 80/20 ratio outlined in the May 1971 Order as a benchmark. (DX 1 at 7; PX 1 at 5)[11]

43. Plaintiffs' 1994 motion to enforce focused on sixteen schools, mostly elementary, with a black student enrollment of 40% or more. Those schools and the percentage of black students attending those schools as of the 1995-96 school year[12] are Robles Elementary (90%), Edison Elementary (75%), Sulphur Springs Elementary (74%), Oak Park Elementary (70%), Graham Elementary (67%), Foster Elementary (610), Cleveland Elementary (57%), Shaw Elementary (56%), Witter Elementary (54%), Cahoon Elementary (52%), Clair Mel Elementary (49%), West Tampa Elementary (47%), DeSoto Elementary (43%), Van Buren Junior High (53%), Sligh Junior (50%), and Dowdell Junior High (49%).[13]

---

[10]See Prior R and R at pages 15, 34-38.

[11]"This Court's 1995 referral order declined to adopt a specific figure in determining racial identifiability and instead stated that the determination is dependent on local conditions.

[12]Data from the 1995-96 school year was utilized at the evidentiary hearing conducted in October, 1996.

[13]The student population statistics for all of these schools are taken from data set forth in DX 7, which consists of the annual

44. Each of the sixteen schools named by the plaintiffs was predominantly white in 1971 following implementation of the desegregation order. (T1 at 33)[14]

45. In the intervening twenty-five years since the 1972-1973 school year, the percentage of black students attending these schools has increased to 40% or more.

46. The percentage of black students in each school as of the 1972-73 school year was as follows: Robles Elementary (24%), Edison Elementary (36%), Sulphur Springs Elementary (19%), Oak Park Elementary (23%), Graham Elementary (35%), Foster Elementary (21%),

---

student assignment reports filed by the School Board. The information about boundary and other attendance changes filed by the School Board. The information about demographic changes is taken from the report of Dr. William A.V. Clark, the defendants' demographics expert, which report was introduced as DX 2.

The data for the boundary and other attendance changes, including their effect on the racial composition of student populations, along with the data on demographic changes, for the sixteen schools about which the plaintiffs complained in 1994 (with the exceptions of DeSoto Elementary and Sligh Junior High) are summarized in Appendix A submitted by the defendants with their proposed findings of fact and conclusions of law. This same data (with the exception of demographic data) is summarized for all other schools (including DeSoto and Sligh) in Appendix B submitted by the defendants. An exhibit introduced at the hearing, the defendants summarized the boundary and other attendance changes made to the sixteen schools about which the plaintiffs complained in 1994 and the projected and actual effects of those changes on student race ratios within the schools. (DX 2; T1-21)

[14]The 1972-73 school year is the earliest year after the 1971 Order for which complete figures are available.

47. These sixteen schools were also the primary focus of the testimony at the unitary status hearing.

Boundary Changes In General[15]

48. Since the 1977-1978 school year, the School Board has made more than 300 modifications in student assignments to relieve overcrowding, to accommodate the opening of newly constructed facilities, or for other reasons. With a few exceptions, none of these boundary changes were made **solely** for the purpose of affecting the racial ratio of a school.[16]

49. In addition, the School Board has accommodated enrollment increases, overcrowding, kindergarten classes, and special program needs by locating or relocating portable classrooms on individual school campuses. Between the school years from 1985-1986 through 1993-1994, the number of portable classrooms used in the Hillsborough County school system increased from approximately 800 to approximately 1200.

50. When making assignment changes to relieve overcrowding or to accommodate new construction, the School Board has taken into account the racial enrollments within the

---

[15]Most of the findings in this section have been stipulated to by the parties. (Dkt. 767 at 18-20).

[16]As the record demonstrates, on some occasions the School Board changed student assignments at certain of the schools which now have black student enrollments of 40% or more in order to improve racial balances. (See DX 3)(Dkt. 796, App. A) However, these changes were infrequent and were usually made inconjunction with some other factor such as relieving overcrowding or when a new school was opened.

new boundary and the effect of the boundary changes on the enrollment ratios at the affected schools.

51. In addition, in making assignment changes to deal with problems of overcrowding or with new school construction, the district where practicable reassigned or divided and partially reassigned existing satellite zones (those originally created in 1971) in a manner that moved enrollments toward the system-wide ratio.

52. In particular, when the School Board constructed a new facility in a suburban area having a small resident black student population within the contiguous zone created surrounding the facility, it would utilize the reassignment of pre-existing satellite zones to increase the number of black students assigned to the new facility.

53. In modifying student assignments to relieve overcrowding or in connection with the opening of a new facility, the School Board has since the 1975-1976 school year created non-contiguous zones or satellites in at least seven instances.[17] In most, but not all of these instances, students reassigned on a non-contiguous basis were being transported to their former school of assignment before the change.

---

[17]These seven instances, and the schools involved, are:

1977-78	Cahoon and Temple Terrace
1980-81	Mort and Cahoon
	Bellamy and Dickenson
1983-84	Dickenson and Bay Crest
1984-85	Dickenson and Town & Country
1986-87	Greco Jr. High and Burns Jr. High
1992-93	Mort/Tampa Palms and Hunter's Green

54. The School Board has never created a new non-contiguous or satellite zone solely for the purpose of altering the racial enrollment ratio at a school, including schools that had majority black enrollments. [18]

55. Since 1986, the School Board has not initiated boundary changes (not otherwise being considered for reasons such as overcrowding or the opening of a newly constructed school facility) for the purpose of altering the racial enrollment ratio at a school, including at schools that had majority-black enrollments.

56. In summary, the School Board's goal since 1971 has been to maintain a desegregated school system. This goal included having the ratios at individual schools come as close to the district-wide ratios as possible. For those schools which experienced increases in the numbers of black students attending the schools, the School Boards would remove a satellite assigned to those schools if it was no longer necessary to maintain racial balance. However, the School Board did not create new satellites for schools with increasing black enrollment as a way to reduce the racial imbalances because of the disruption that would. have on the families and children attending those schools. (T7 at 219-21)

Student Enrollments and Demographics

---

[18]This stipulation is understood to refer to satellite attendance zones created **subsequent** to the desegregation of the Hillsborough public schools which was achieved during the school year 1971-1972. Those created for that year wee at the express direction of the Court when the formerly black schools were closed and the students attending those schools were reassigned to other schools.

57. Each of the sixteen schools named by the plaintiffs was predominantly white in 1971 following implementation of the July 1971 order. (T1 at 33)

58. The parties have examined demographic data for Hillsborough County to determine whether changes in residential housing patterns may explain why there is a higher percentage of black students at certain schools than existed in the past.

59. The most recent demographic data available for this inquiry is derived from the Decennial United States Census conducted in 1990. Since the Census is conducted only every 10 years and no special census has been taken in the interim, the 1990 Census figures provide the most up-to-date data available.

60. From 1970 to 1980 the total population of Hillsborough County, Florida, rapidly increased from 490,265 persons in 1970 to 626,960 persons in 1980. The total population in 1990 increased substantially again to 834,054. (DX 2 table 1) The percentage increase of the total county population was approximately 30 percent during 1970-1980; the percentage increase during 1980-1990 "inner city" neighborhoods, this area experienced a loss of about 21,000 white persons and a gain of about 4,000 black persons between 1970 and 1990. (DX 2 at Table 4; T2 at 23)

65. Census data shows that the number of tracts in Hillsborough County with black populations of 95 percent or more decreased substantially from seven in 1970 to two in 1990. At the same time, the number of tracts with populations of 25% to 50% black residents more than doubled from 1970 to 1990. (T4 at 61; PX 2 at 18) Tracts with populations of 50% or more black residents have expanded about 40 percent over the twenty-year period. (T2 at 34)

66. During the period 1971 to the fall of 1995, the percentage of black high school students increased from 14% to 21%. During the same period the percentage of black junior high students increased from 20% to 23%. At the elementary level, the increase was from 21% to 24% black students. (PX 1 at 4-5)

67. Census information for the tracts having public schools with black student enrollments of 40% or more (thirteen elementary schools and three junior high schools) generally shows these schools as located within areas where the number of black residents is increasing relative to the number of white residents of those tracts. (T2 at 56)[19]

68. While noting that in 1970 it "was possible to maintain a large number of schools with black enrollments of less than 40 percent," Dr. Clark concluded that the increased proportion of black residents "in the neighborhoods north of the Hillsborough River and east of 22nd Street after 1980 and the continuing overall white student losses from inner city areas made it impracticable or impossible to make further attendance zone adjustments in order to maintain racial balance within the plus or minus 20 percent band." (DX 2 at 9)

69. The evidence indicates, among other things, that for the school year 1990-1991 the disparity between census information and enrollment was not substantial at most of the schools identified at the hearing which have black student enrollments of 40% or more. Shown below is the percentage of black enrollment at a school, followed by the 1990 census

---

[19]Appendices 1,2 and 3 to this Report and Recommendation incorporate demographic sixteen schools with black student enrollment of 40% or more. (DX 2, Tables 1, 4 and 5)

information of black residents age 0 to 17 living in the attendance zone (shown in **bold**): Robles Elementary (86%, **71%**), Edison Elementary (69%, **70.5%**), Sulphur Springs Elementary .(62%, **51.6%**), Oak Park Elementary (61%, **56.8%**), Graham Elementary (68%, **42.9%**), Foster Elementary (46%, **52.4%**), Cleveland Elementary (52%, **41.4%**), Shaw Elementary (38%, **33.8%**), Witter Elementary (45%, **41.1%**), Cahoon Elementary (38%, **33.5%**), Clair Mel Elementary (41%, **55.1%**), West Tampa Elementary (44%, **31.6%**), Van Buren Junior High, (42%, **39.6%**), and Dowdell Junior High (42%, **39.6%**). (Dkt. 796, App. A)[20]

70. Dr. David Armor, a well recognized expert in school desegregation cases,[21] studied the sixteen schools with a black student population of 40% or more against the background of post1972 boundary changes effected for those schools and the census data gathered by Dr. Clark. (T3 at 33-48; DX 1) He noted that only a "handful" of schools (15 out of a total of 135 schools) have been or are currently out of balance. (T3 at 54)

71. None of the current or past racial imbalances in county schools are attributable to school board action, including boundary changes, but rather are attributable to demographic changes, according to Dr. Armor. (T3 at 53)

---

[20]DeSoto Elementary and Sligh Junior High School were not included in Dr. Clark's demographic study of 1990 census information. (DX 2) Black student enrollment for the 1990-1991 school year was 50% at DeSoto Elementary and 35% at Sligh Junior High. (Dkt. 796, App. A and B)

[21]Dr. Armor has always testified in favor of school boards at unitary status hearings. (T3 at 118)

72. Dr. Armor concluded that defendants have implemented "a highly effective desegregation plan that virtually desegregated the entire district to a very high degree of desegregation, as high as I've seen anywhere in this country but especially in the south, and that it maintained that plan for a very long time." (T3 at 49)

73. Dr. Fred Shelley, plaintiffs' demographics expert, did not conduct any demographic studies of his own, but relied on Dr. Clark's data in drawing some differing conclusions. (T4 at 50-56) Dr. Shelley agreed that both the inner-city areas identified by Dr. Clark and the neighborhoods surrounding those areas had experienced an increase in the percentage of black residents over the past twenty years. (T4 at 81-83) But he did not think that demographics could totally explain the dramatic increases in black student enrollment at some schools. (T4 at 51-56; 56-58)

74. Dr. Shelley concluded that "it is perhaps difficult to conclude that increase in racial imbalance is attributable solely to the processes of natural demographic change." (T4 at 56, 66) While agreeing that the most recent demographic data available is from the 1990 census, Dr. Shelley had reservations about drawing conclusions about present student enrollments based on that data. (T4 at 106)

75. Despite differing with the conclusions drawn by Dr. Armor, Dr. Shelley was unable to provide an alternate hypothesis for the increased black enrollment at the sixteen schools targeted by plaintiffs and studied by Dr. Armor. (T4 at

95) Dr. Shelley conceded that only ten boundary changes had occurred after the schools became imbalanced. In some of the schools [22]

76. Also, Dr. Shelley apparently erroneously assumed that Dr. Clark's demographic data included children attending a school as part of a satellite attendance zone. (T4 at 91) The presence of a satellite could cause that school to have a racial balance which might seem disproportionate to the racial balance in the school attendance area. (T4 at 91-92) He also agreed that in a highly segregated area it is more difficult to adjust boundaries or make other changes without substantial disruption including transportation. (T4 at 78)

77. Evidence presented at the hearing by the School Board included the percentage of black students at the schools before each attendance change and the percentage of black students at the schools after the change. However, it is undisputed that whenever the School Board proposed an attendance change, it estimated the projected attendance figures, including the percentage of black and white students for these

---

[22]Defendants' Appendix A and B (Dkt. 796) summarize evidence as to boundary changes and the race ratios before and after the boundary changes for each school in Hillsborough County during the period of court supervision. Many of the sixteen schools identified by plaintiffs as racially unbalanced have not had many boundary changes in recent years. For example, Cahoon has had no boundary changes since 1989 when its black student enrollment was 34%. Edison's last boundary change was 1982 when it was 500 black. Fosters last boundary change was in 1984 when it was 29% black. Oak Park has had no changes since 1978 when it was 41% black. Robles last had a boundary change in 1976 when it was 30% black. Shaw and Sulphur Springs have not had boundary changes since 1989 when they were 37% black and 59% black, respectively. (App. A)

schools. (DX 3, 7; T1 at 23) In most instances when an attendance change was made, the School Board expected the change to improve the race ratio at the affected school and, those times when the change did not improve the ratio, the School Board expected the ratio to change by only a few percentage points. (DX 3, DX 7) Occasionally, the projection did not hold because the demographics of the affected area changed unpredictably. (T1-23)

78. If demographic factors explain the racial imbalances at those schools, it is unnecessary to reach the issue of what further desegregative techniques could be employed as this Court has never required defendants to adjust racial enrollments at Hillsborough County schools on an annual basis.

79. Notwithstanding the evidence pointing to demographic change as the most likely explanation for the increased black enrollment at thirteen elementary schools and three junior or middle schools, certain factual issues raised by plaintiffs should be addressed.

80. Dr. Shelley examined five of what he called the "long unbalanced" schools--Cleveland, Edison, Graham, Robles, and Oak Park--and noted that the attendance areas for these schools do not adjoin each other. He testified that it was at least "plausible to be able to make some slight adjustments in the boundaries of these attendance areas and reassign some students such that the degree of racial imbalance is lessened in those schools." (T4 at 64)

81. It must be remembered that the disparity in racial enrollments was also present, albeit to a lesser degree, when plaintiffs and the School Board approved the clusters as part of the middle school plan adopted by this Court in the 1991 Consent Order. (Prior Report and Recommendation at 29, 32 and n.22) Since the. implementation of the clusters, actual black

enrollment has exceeded projected enrollment for some schools.[23]

82. Testimony received at the 1994 hearing on plaintiffs' motion to enforce court order demonstrated that at least as to West Tampa Elementary, reassignment of students according to suggestions made by plaintiffs' desegregation expert, Dr. Stevens, was not practicable.[24]

83. Plaintiffs have presented proposed findings addressing some of the sixteen schools which currently have 40% or more black student enrollments in terms of their location in clusters with other schools which have a much lower percentage of black student enrollments. (Dkt. 796 at 18-19)

Edison Elementary

84. Edison Elementary School (75% black)[25] is in a cluster with Morgan Woods (10% black), Town & Country (27% black) and Woodbridge (21% black). (PX 7 at 2)

85. However, these elementary schools are not in the area immediately adjoining the Edison attendance zone. Rather, the schools which immediately adjoin the Edison attendance

---

[23]A chart prepared by Dr. Stevens compares the race ratios projected by the 1991 middle school plan and actual race ratios in 1995 for the schools having black student enrollments of 40% or more. (PX 1, Ex. le)

[24]See Prior R & R at 38-40.

[25]The racial enrollments listed in plaintiffs' exhibit are based on the 1995-96 school year.

zone are Foster (64% black), Broward (35% black), and Seminole (40% black). (DX 8 at 4)[26]

Cleveland Elementary

86. Cleveland Elementary School (52% black) is in a cluster with Carrollwood (15% black), Forest Hills (27% black) and Lake Magdalene (12% black). (PX 7 at 2) Forest Hills does adjoin the Cleveland attendance zone at the northwest corner but its boundaries include a portion of Florida Avenue and Busch Boulevard, major city streets. The other schools do not. The other schools surrounding Cleveland are Seminole (40% black), Sulphur Springs (80% **black), and Foster** (64% black).

Sulphur Springs Elementary

87. Sulphur Springs (74% black) is in a cluster with Twin Lakes (17% black). (PX 7 at 2; DX 7 at 18, 20)[27] However, Twin Lakes does not adjoin the Sulphur Springs attendance zone. The elementary schools which do adjoin the Sulphur Springs attendance zone are: Shaw (59% black), Cahoon (55% black), Foster (64% black and Cleveland (53% black).

Graham Elementary and Foster Elementary

---

[26]The racial enrollments shown on defendants' exhibit are from the **first month** attendance figures for the 1996-97 school year and so they differ somewhat from the percentages shown in PX 7 as well as other exhibits which may be in evidence, including the 6th Annual Report which is the most current data in the record for the 1996-1997 school year.

[27]Students who attend Sulphur Springs and Cleveland also attend Adams Middle School. (PX at 7)

88. Plaintiffs also point out that Graham (67% black) and Foster (61% black) are in a cluster with Broward (34% black), Egypt Lake (22% black), Mendenhall (30% black), and Seminole (37% black). (PX 7 at 3; DX 7 at 3, 7-9, 13, 17)

89. With the exception of Seminole, which is to the southwest of the Foster attendance zone (divided by 12th Street), none of the other schools which adjoin Foster are under 40% black. Instead, Foster is bordered by Sulphur Springs (80% black), Cahoon (55% black), and Edison (78% black). (DX 8 at 5) Also, the dividing line between the attendance zones for Graham and Broward is Indiana Street. Graham is also divided from Tampa Bay Boulevard Elementary (27% black) by the Hillsborough River. (DX 8 at 6)

Robles Elementary

90. Robles (90% black) is in a cluster with Folsom (29% black). (PX 7 at 3; DX 7 at 8). While the Folsom attendance area adjoins Robles to the east, the two zones are separated by a CSX railroad track. Also, the other attendance areas surrounding Robles are Riverhills (45% black) and Cahoon (55% black). (DX 8 at 9)[28]

Cahoon Elementary

91. Cahoon (52 % black) is in a cluster with Hunter's Green Elementary School (19% black). (PX 7 at 3; DX 7 at 9) Hunter's Green is not an adjoining school zone, however.

---

[28] In 1975 or 1976 the School Board considered converting Robles to a sixth-grade center as a way to reduce the increased black enrollment at the school. However, after talking to the parents in the Robles neighborhood, the School Board dropped that idea because the parents who lived in that area were opposed to it. (T7 at 220)

Instead, Cahoon is adjacent to Witter (55% black), Temple Terrace (34% black), Riverhills (45% black), Robles (88% black), Foster (64% black), Sulphur Springs (80% black) and Shaw (59% black). (DX 8 at 1)

Shaw Elementary and Witter Elementary

92. Shaw (56% black) and Witter (54% black) are in a cluster with. Tampa Palms Elementary School and two other elementary schools to be built after the 1995-1996 school year. (PX 7 at 3) Tampa Palms Elementary School is 14% black. (DX 7 at 19) Although a satellite attendance zone for Hunter's Green adjoins both the Shaw and Witter attendance zones (DX 8 at 9, 12), there is no indication that the Hunter's Green attendance zone adjoins either Shaw or Witter and that would be unlikely since, by definition, a satellite attendance zone is a non-contiguous attendance zone.

Oak Park Elementary

93. Plaintiffs' proposed findings do not address Oak Park. Its attendance zone is adjoined by the attendance zones for Palm River, DeSoto, and Kenly, all of which had a black enrollment of 35% or more for the first month of the 1996-1997 school year. (DX 8 at 8)

94. Dr. Stevens testified at the unitary status hearing that he had "not drawn any plan for any particular school" for reducing the percentage of black students at the schools which have a black student enrollment of 40% or more. (T4 at 206)[29]

---

[29] Dr. Stevens is also an expert in school desegregation cases. He has never testified on behalf of a school system, however, or in favor of a declaration of unitary status as to student assignment. (T4 at 154)

Magnet Schools and Programs

95. Magnet programs are one of the most effective desegregation techniques employed by school boards today.

96. When the Court approved the Consent Order in 1991, a key objective of the Middle School Plan was to locate magnet programs in the inner city schools where the greatest number of black students reside. Today, all ten elementary school programs are located in neighborhoods which consist primarily of black residents. (T1 at 177)

97. As suggested by its name, the magnet program or school offers a special curriculum which is designed to attract students based on their special interests. Students who attend magnet programs are provided transportation if needed. (Ti at 173-74) For the 1996-1997 school year, defendants offered twelve magnet programs. Three additional magnet programs will be offered for the 1997-1998 school year. (T1 at 143)

98. Mary Ellen Elia, director of the School Board's magnet school program, estimated that by the time the program is fully implemented, almost 90,000 students will be participating in magnet programs in Hillsborough County. (T1 at 170) All of the magnet programs and schools opened so far have been successful. (T1 at 154)

99. The School Board actively markets its magnet programs, including advertising in the media. The staff responsible for the magnet programs also meet with community groups across the county. (T1 at 144-50)

100. As there are more applicants than openings in the programs, lists of students are made by computer random draw. Students are then selected based on gender, ethnicity, and grade

level. Gender and ethnicity are used as selection criteria to achieve a balanced population. (DX at 10) Also, applicants living closes to the school are given priority in at least some situations.[30] (T1 at 162)

101. In order to obtain federal funding for the magnet school program, the School Board had to establish that it would foster desegregation and attract substantial numbers of students of different racial backgrounds.[31] Under the School Board's plan, students who are members of a minority group can comprise up to 40% of the students participating in the magnet programs or attending magnet schools. (T1 at 166) That percentage was chosen because it represents the total percentage of students within the school system who belong to a minority group. (Dkt. 808, Affidavit of Mary Ellen Elia) ("Elia affidavit")

102. The magnet school plan also specifies the percentage of particular minority groups within the 40% cap who may be admitted under the plan: 23% Black; 14% Hispanic; 2% Asian Pacific Islanders; and .02% American Indians. (T1 at 166)

103. The percentage figure of 23% for black student enrollment was part of the Middle School Task Force Plan. Plaintiffs and defendants agreed to this figure as part of their negotiations. However, the Plan also provides that if students from other minority groups do not apply for the magnet

---

[30] Hillsborough County has both magnet programs and magnet schools. It is not clear from the testimony whether students applying for magnet programs also receive first priority if the live closest to the schools. (T1 at 161-64) 30

[31] See 34 C.F.R. § 280.1 et. seq. (1996).

programs, black students may be accepted into the programs as long as total black enrollment does not exceed 40%. (Elia affidavit at 3-4)

Special Transfer Requests
Including majority to Minority Transfers

104. The Court's July 1971 Order set out specific criteria the School Board was to follow in handling requests to transfer students from one school to another. (July 1971 Order, at 11, Ex. 2) The Court has not altered the School Board's obligations since that time.

105. The only grounds authorized for transfers are: (1) majority to minority transfers; (2) transfers recommended by the juvenile court; (3) transfers for exceptional children; (4)transfers for children of School Board teachers and staff to their parents' place of employment; (5) transfers to attend Tampa Bay Vocational-Technical High School; and (6) transfers in cases of severe hardship after determination of each case by the School Board.

106. Transfers under (3),(5), and (6) can be approved by the School Board only after considering recommendations from the BiRacial Committee. They are to be considered without regard to race except transfers are not to be approved if made for the purpose of avoiding desegregation. Transfers under (1) and (4) are to be reported to the Bi-Racial Committee.

107. Majority to minority ("M to M") transfers allow a student to transfer from a school in which his race is in the majority to attend the closest school to his residence in which his race is in the minority. Transportation is to be provided if the school to which a student is transferred is more than two miles from the student's home.

108. It appears that no M to M transfers have ever been sought from the School Board. (T1 at 90-91) Although parents were generally familiar with the special transfer requests, they did not seem familiar with M to M requests. Dr. Miliziano, the Superintendent's Administrative Assistant, testified that not until recently did the School Board start evaluating special assignment requests made on other grounds to determine whether the children seeking the transfer would be eligible for an M to M transfer. The transfer request forms now have a request for the race of the student to be listed. The transfer requests sought on other grounds are granted if the request would qualify as an M to M request. (T1 at 90-92)

109. The M to M transfer program is now publicized as a result of a recommendation by School Board staff in July 1995. (PX 14) Since the policy has been publicized there have been no specific M to M transfer requests. (T1 at 106)

110. Dr. Stevens, plaintiffs' desegregation expert, would like to see the School Board do more marketing of the M to M transfer program but agreed that use of the M to M transfers would not make a big difference in alleviating racial imbalances. (T4 at 195)

111. Dr. Stevens studied other types of special transfers and concluded that defendants' granting other transfer requests had increased the racial imbalances at seven of the imbalanced elementary schools for the year 1995. His study indicated that the percentage of black students enrolled in those schools (Cahoon, Cleveland, Foster, Graham, Robles, West Tampa, and Witter) experienced increases ranging from five to seven percent as a result of special assignments allowing students to attend those schools who are not really assigned to them. (T 4 at 129-30) (PX 1 at 13)

112. This issue was addressed at the prior hearing on plaintiffs' motion to enforce court order. In effect, Dr. Stevens believes the Court should reconsider its prior directive to the School Board to grant transfers for extreme hardship "without regard to race" if the effect of that policy would be to contribute to racial imbalance. (PX 1 at 12-13) For the reasons stated previously, for this Court to order defendants to deny black parents severe hardship transfers for their children because the transfers would adversely impact race ratios is neither practical nor wise. (Prior R and R at 24-26)

113. No evidence was presented that the School Board has failed to follow the Court's directives as to special assignments.

FACULTY AND STAFF ASSIGNMENTS

114. For the 1993-1994 school year, 14% of the teachers in Hillsborough County were black. For the same year, blacks constituted 17% of the principals, 22.2% of the assistant principals, and 7.9% of the district administrators (at the main school board office). of the noninstructional permanent personnel, 16.1% were black. Black teacher aides comprise 25.3% of the total teacher aides employed by the county.[32] (T2 at 132-135)

115. According to Marilyn Whittner, Director of Human Resources, the School Board has "a dearth of minority applicants for our teaching positions and we are constantly seeking minority teachers." (T2 at 105) The School Board

---

[32]Defendants used district-wide employee data from the 1993-1994 school year at the unitary status hearing. (T2 at 134)

focuses recruitment efforts at colleges with a substantial percentage of black graduates.

116. Additionally, a mentoring program has been instituted for black teachers who aspire to be administrators. More than one-half of the graduates of that program have been placed in administrative or teacher resource positions. (T2 at 108-09; PX 14)

117. For instructional and non-instructional personnel, the principal at an individual school interviews prospective applicants and is authorized to make offers contingent on approval by School Board and staff. Principals are given criteria for open positions. If Human Resources determines that a new hire would adversely affect the racial ratio at a particular school it will disapprove the offer unless no qualified candidates are available. (T2 at 112-16)

118. Instructional personnel employed by the School Board are represented by a union which negotiates salaries based on the level of service and academic degree held by the employee. These salary levels are applied across-the-board to all teachers. (T2 at 11415)

119. There are currently no schools in which black teachers or staff constitute a majority at any school nor has that situation existed in the past since the 1971 Order was entered. (DX 7)

120. The parties' experts differ on whether some schools are racially identifiable due to their faculty and staff compositions. Using a 15% deviation standard, Dr. Stevens identified twelve elementary schools which are not in compliance with the districtwide ratio. However, Dr. Armor, defendants' expert, did not find any schools which fit into this category. This is because Dr. Armor used only faculty data; Dr.

Stevens used data from the annual reports which aggregate faculty and staff and include non-certified personnel. (T4 at 139) However, the 14% figure cited by defendants referred only to black faculty, not staff. (T2 at 130, 132)

121. None of the Court's orders have ever required the School Board to provide racial balance at the upper management level. However, plaintiffs note the paucity of upper-level black administrators during the time the School Board has operated under court supervision. During this period, only one of the six Assistant Superintendent positions has been held by a black individual: Assistant Superintendent of Support Services. (T7 at 145-47)

122. Defendants have never been found liable for racial discrimination in employment based on records which have been maintained since at least 1977. Some complaints have been resolved at the administrative stage. (T7 at 199-200)

123. The School Board has in place grievance procedures which can be utilized by parents and students as well as employees and includes various levels of review, including a public hearing before the School Board. Student handbooks distributed to every student at the start of the school year outline these procedures. (T7 at 201-04)

124. Dr. Samuel Horton, an educator with the School Board between 1977 and 1991, served as General Director of Secondary Education where he helped develop guidelines for the gifted program among other programs. He noted the absence of any blacks in assistant superintendent positions during that time. Dr. Horton, who is African American, stated that he applied twice for the position of Assistant Superintendent for Instruction but was not selected either time. While he did not file a grievance, Dr. Horton testified that he believed he was not selected due to his race. (T6 at 88-96; 103)

125. Ann Porter, head of the Tampa branch of the NAACP, testified about concerns about black males being denied employment opportunities and other complaints she receives.[33] Ms. Porter, who is African American, meets with the Superintendent and staff on the average of once or twice a month. This working relationship has become stronger with the current Superintendent, Dr. Earl Lennard. Although she is opposed to a declaration of unitary status at this time, Ms. Porter admitted that many complaints are resolved through these informal meetings. (T6 at 139-41)

TRANSPORTATION

126. With regard to transportation of students, the School Board's obligation has been to insure that bus routes and assignment of students to buses "assures the transportation of all eligible students on a non-segregated and otherwise nondiscriminatory basis" and to regularly re-examine its transportation system. (July 1971 Order at 10)

127. In 1996, the School Board transported approximately 80,000 students daily. It is the fifth largest school district in the nation in terms of the numbers of students transported. (T1 at 123) For the 1994-95 school year, the School Board received over $17 million in state funding for transportation. (DX 24)

128. As required by Florida law, any student attending a school two or more miles from his residence must be furnished transportation by the school district. (DX 21) The

---

[33]Ms. Porter was not asked about a venture between theUniversity of South Florida and the School Board launched inAugust 1995 to place black male teachers with the School Board after graduation. (DX 14, "Project PILOT" documents)

School Board has always complied with this requirement. (T1 at 122-25)

129. The School Board provides transportation for all students who qualify and no distinctions are drawn as to race. (T1 at 13133)

130. The desegregation technique adopted in the 1971 Order involved closing the formerly all-black schools and assigning them to "satellite" attendance zones. (T4 at 135-36)

131. The School Board has maintained data on the number of students transported annually and their race. For the 1995-96 school year, approximately 18,400 students were transported for desegregation purposes including students attending magnet schools. (PX 1 at 20)

132. Of this number, more black students than white students were transported at each of the three school levels: elementary, middle, and high school. (PX 1 at 20)[34]

133. At no time after the 1971 Order was entered did plaintiffs raise any objection about the number of students bused, including when the desegregation plan was modified in the 1991 Consent Order due to implementation of the middle school plan.

134. Part of the reason for adopting the Middle School Plan was to allow students to attend schools close to their homes as much as possible. (T1 at 65)

---

[34]Of the elementary students transported 23% were black and 10% were white. At the middle school level 26% were black and 18% were white. Of the high school students, 24% were black and 8% were white. (PX 1 at 20)

135. Although the 1971 Order did not require provision of transportation for after-school activities, the School Board provides "activity buses" for after-school activities to afford students living in satellite areas (a non-contiguous attendance zone area) the opportunity to participate in those activities if they were not able to provide their own transportation. Because the junior high schools are being phased into middle schools which are "self-contained" in their activities, the activity buses are primarily used at the high schools. (T1 at 123-30) Activity buses are provided for any students who need to stay after school for any reason, and are not limited to athletics or clubs. (T1 at 138-41)

136. In 1989 the School Board examined whether providing only one activity bus per satellite area met the needs of the students. The superintendent and his staff determined that more than one activity bus per school might be needed on certain days due to the number of activities and events scheduled at the schools. (DX 23) 137. This policy was implemented and remains in effect today. The School Board supervisor of transportation surveys schools on a weekly or daily basis to determine the number of buses needed. (T 131-36; 138-41)

EXTRACURRICULAR ACTIVITIES

138. Under this Court's desegregation plan the School Board has been ordered to regularly, re-examine its extra curricular activities to insure that they are maintained and operated on a non-segregated and non-discriminatory basis. (July 1971 Order at 10)

139. In the fall of 1971 the Hillsborough County school system was integrated in its athletic programs and all students, regardless of race, were given an equal opportunity to participate in athletics. (T1 at 112-13)

140. Since that time, a committee composed of the athletic director and assistant school principals has regularly reviewed proposed changes in the athletic programs pursuant to policies adopted by the School Board. The School Board offers a number of athletic programs, ten for females and ten for males. (T1 at 11315)

141. Athletic activities are offered at each senior high school and existing junior high school. They have been eliminated at the middle schools as part of the restructuring program and due to funding. The director of athletics hopes to provide athletic programs at the middle schools in the future. (T1 at 114-15; 119-20)

142. Of total student participation in athletics, approximately 23% of the athletes were black and approximately 77% were white for the school year 1996-97. Participation varied from school to school and sport to sport. For example, total participation in basketball for black students was 54% (males) and 49% (females). On the other hand, participation by blacks on high school swim teams was very low. Only three black students (one female, and two males) participated on high school swim teams. Over 18% of the cheerleaders were black. (DX 28; T1 at 115-19)

143. The School Board also offers a variety of other extracurricular activities at senior high schools, including: drama, choral program, string and instrumental music programs, honor clubs, service clubs and various interest clubs. (T2 at 127-28)

144. Defendants do not maintain data on a school by school basis for extracurricular activities but do track overall participation by race. In 1995, black students accounted for 11% of the honor society memberships, 12% of drama clubs, 27% of

student councils, 20% of marching bands, 14% of orchestras, and 19% of choral groups. (PX 1 at 27)

145. These activities are open to all students and no students are denied the opportunity to participate because of their race. [35]

FACILITIES AND RESOURCE ALLOCATION

Site Selection and School Openings and Closings

146. The School Board's duty as to facilities under this Court's order is the same as with transportation and extracurricular activities. As required by prior orders of the Court, the School Board was to make sure that school construction, school consolidation and site selection (including the location of any temporary classrooms) should be "done in a manner which will prevent the recurrence of the dual school structure." (July 1971 Order at 11).

147. The School Board has reported to this Court the opening and closing of schools and the impact of these actions on the race ratios at the schools. (T1 at 24) It has also presented proposed plans to the Biracial Committee for input. (T1 at 64)

148. the percentage of black students attending these

---

[35]Mae King, mother of an Armwood High School student, testified that she observed cheerleading try-outs at Armwood recently because she was concerned that there were not enough black cheerleaders. As a result of the try-outs, however, three blacks were chosen for the varsity squad and three were chosen for the junior squad. (T4 at 17-27) Ms. King also recounted an incident where a suggestion was made at a PTA meeting to have a black disc jockey at a school dance and some of the people at the meeting got upset and walked out. (T4 at 20-21; 27-28)

schools the first year was brought closer to the 80/20 ratio. (DX 4)[36] By 1995, five additional schools were built. (PX 2 at 8) None of the new schools has been opened with an allwhite population or a black population of close to 40 percent. (T1 at 26)

149. As a general rule, the School Board has approved construction of new schools in areas of increasing population growth and where the greatest amount of overcrowding exists. (T1 at 25) During the past twenty-five years, most new schools have been opened in the suburbs. In every case of a new school opening, the School Board took into account the projected race ratios at the new schools and assigned satellite attendance areas if necessary to maintain a racial balance at those schools. (T1 at 33) Especially with the elementary schools, the School Board tried to assign students to a school near their residence so they could walk to school. (T1 at 43)

150. A total of nine schools have been closed since the 19711972 school year. (DX 5) When those schools were closed the School Board took into account the race ratios at the closed school and the schools to which the pupils were reassigned. (T1 at 30-31) In most cases, the closing of the schools brought the schools the students were reassigned to closer to the 80/20 ratio. (DX 5)

151. Plaintiffs have been notified of all school construction through the reports filed with the Court as to boundary changes. Plaintiffs have never objected to the location of new schools. Although most of the new schools have been opened in the suburbs, Blake High School, which is a magnet high school opens in the 1979798 school year near downtown

---

[36]The School Board's exhibit does not address schools opened after the 1993 school year.

Tampa. Defendants have also opened several magnet schools in predominantly black, inner-city areas: Lee, Phillip Shore, and Dunbar Elementary Schools as well as Young and Middleton Middle Schools. (T1 at 155; 174-177)

Overcrowding

152. During the past ten to twelve years, overcrowding has become a problem for most Hillsborough County schools and double sessions a reality at some. (T1 at 61)

153. Plaintiffs introduced evidence that the schools having a black student enrollment of 40% or more are more likely to be overcrowded in terms of their Florida Inventory of School Houses (FISH) capacity. Plaintiffs' demographics expert, Dr. Shelley, testified that schools with a 40% or more black enrollment are more likely to have enrollments significantly over their FISH capacities than schools which are racially balanced. (T4 at 37; PX 2 at 1113, 22-23)

154. Dr. Shelley's data also shows that in 1995, a total of 102 public schools in Hillsborough County were more than 25% over their FISH capacity: 88 were racially balanced schools and 14 were unbalanced[37] schools. Only 8 of the 88 balanced schools were more than 50% over their FISH capacity but 4 of the 14 unbalanced schools fell into this category. (PX 2 at 23)

155. However, the FISH capacity of a school does not include portable classrooms. Use of portables does not

---

[37]Dr. Shelley used the same measure of racial imbalance used by Dr. Armor and Dr. Stevens.

necessarily mean that a school is overcrowded. (T4 at 101-03)[38]

156. Some classes, particularly those which are federally funded, provide an opportunity for a lower/pupil teacher ratio. Thus, a classroom built for 25 or 30 children may hold only 20 children. (T1 at 63-64) Most, if not all, of the sixteen schools with black student enrollments of 40% or more are included in the sixty-one "Title 1" schools in Hillsborough County which received additional funding per pupil for the school year 1996-97. (DX 37)

157. The School Board recognizes that overcrowding is a serious problem and that the entire community is concerned about it. Last year, voters approved a sales tax increase. The School Board appointed an overcrowded Schools Task Force. The Superintendent and his staff compiled data for all Hillsborough County public schools including FISH capacity, number of portables, as well as the acreage of each school site. The Percentage of Capacity Report (DX 32) generated for the Task Force and the School Board is being used to determine what measures need to be taken to relieve overcrowding. (T7 at 222-24)

158. Although no testimony was provided interpreting the Percentage of Capacity Report in terms of individual schools, it appears that of the 105 elementary schools surveyed, the ten elementary schools with the highest number of points include Edison, Witter, DeSoto, Shaw and Cleveland, all of which have black student enrollments of 40% or more. (DX 32, Elementary Schools, at 1)

---

[38]Defendants have provided a 46-page list entitled "Relocatable Classroom Inventory" which listing all portable classrooms placed in use between 1949 and 1995 and their locations. (DX 29)

158. Although no testimony was provided interpreting the Percentage of Capacity Report in terms of individual schools, it appears that of the 105 elementary schools surveyed, the ten elementary schools with the highest number of points include Edison, Witter, DeSoto, Shaw and Cleveland, all of which have black student enrollments of 400 or more. (DX 32, Elementary Schools, at 1)

Teacher Resources

159. For the 1992-93 and 1994-95 school year, schools with a black student enrollment of 40% or more had a lower teacher-student ratio than the other schools with fewer than 40% black students. (DX 1, charts 33 and 36)

160. For this two-year period, there was also no discernable difference in terms of educational degrees and experience of the teachers at the over 40% schools and those which were under 40% in terms of black student enrollment. (DX 1, charts 33-36)

Expenditures

161. In 1995, the School Board had a budget of $1.2 billion. (T7 at 150)

162. Funding is received from three separate sources: federal, state, and local. Funds for operating expenses come from the Florida Educational Finance Program (FEFP), a state program that funds school district based on the needs of students and the costs to provide -education in the school district as opposed to other Florida school districts. The FEFP funds come from three sources: state revenue based on sales tax, local property tax revenue, and revenue from the state lottery. (T1 at 185-88)

163. The School Board also receives funding from the federal government for educating handicapped students and funding based on the socioeconomic needs of the students. Capital outlay expenses for new schools and other capital expenses come from local taxes. The School Board also receives some state funds generated from gross receipts on utilities. (T1 at 188)

164. Various agencies of the federal and state government regularly audit the School Board to insure expenses meet the program requirements and that funds are allocated on an equitable basis. (T1 at 190-91; 195-97)

165. There is no difference in the per capita expenditures of the School Board on instructional salaries for teachers districtwide regardless of the racial composition of the schools. (DX 1, charts 37, 40) As stated in the preceding discussion of faculty and staff, instructional salaries are set by the collective bargaining agreement between the teacher's association and the School Board. The federal government also prescribes comparability standards for employees paid by federal funds. (T1 at 199)

166. Funding for instructional resources is allocated by the School Board on a pupil by pupil basis without regard to race, ethnicity, gender, or other limits such as the FISH capacity for the school. When a group of schools is converted to the middle school plan, those schools receive additional resources due to the conversion. (T7 at 191-93)

167. A comparison of expenditures for instructional supplies and equipment for fiscal years 1993 and 1995 showed that elementary and junior high schools which were more than 40% black received slightly less funding than schools which were less than 40% black. (DX 1, charts 38 and 41)

168. The School Board attributes this difference to "conversion funds distributed to schools which were newly constructed or reconfigured pursuant to the Middle School plan" and notes that "[m]ost of the over 40% schools [are] not scheduled for conversion until the 1996-1997 and 1997-1998 school years." (Dkt. 797 at 83) The record supports this argument. (T1 at 97)

169. In addition, a study of total capital expenditures for fiscal years 1993 and 1995 indicates that there was essentially no difference between schools which were over or under 40% black. During the latter year, elementary schools which were over 40% black received more funding. (DX 1, charts 39 and 42)

170. A review of capital expenditures during the period 1991 to 1995 by Dr. Armor revealed that expenditures for inner city elementary schools (which comprise most if not all of the more than 40% black schools) were slightly higher than those of the other elementary schools.[39] Spending for the inner city junior high schools was substantially higher than other junior high schools. (DX 1, chart 43)

QUALITY OF EDUCATION

---

[39]Darrell Daniels, one of the witnesses called by plaintiffs, is employed with the Urban League and operates youth development programs at Robles and 31 other schools. One of his children attends Robles. While commending the principal of Robles, Mr. Daniels, who is African American, criticized the lack of commitment to education which he saw in the other personnel at the school. He also felt that Robles did not have the equipment such as computers which other schools have. However, he agreed that a school's commitment to education can vary regardless of the racial make-up of the school. (T6 at 58-77)

171. Several witnesses called by plaintiffs, including plaintiff Andrew Manning and School Board Chair Doris Reddick, testified poignantly about the differences between black and white schools in the era of de jure segregation. Mr. Manning and Ms. Reddick attended public schools in Hillsborough County. Ms. Joanna Tokley taught in the public schools, both before and after the Court's 1971 desegregation order. All three are African American. (T3 at 163-68; T5 at 20-23; T6 at 103-110)

172. Orders entered in this case have not required the School Board, in dismantling the dual school system, to attain specified levels of student achievement or any other standard to evaluate quality of education. However, this Court's referral order directed that the quality of education, along with the other Green factors be evaluated as well as the School Board's good-faith commitment in determining whether the public schools of Hillsborough County have attained unitary status.

173. Evidence presented by the parties concerning the quality of education today focused on academic achievement, enrollment in gifted programs, and suspension and dropout rates. Other factors bearing on quality of education such as facilities and resources as well as magnet programs have been addressed in the preceding sections.

Achievement Tests

174. Since 1977 the School Board has examined the results of achievement tests by students of different races on a regular basis. (T2 at 147)

175. Dr. John Hilderbrand, who has supervised testing for the Hillsborough County school system since about 1977, testified that there are an increasing number of state-mandated

tests for students that are administered and evaluated by the School Board. (T2 at 138-40)

176. On the Stanford Achievement Test, Hillsborough County students scored slightly below the 50th percentile in reading and slightly above the 50th percentile in math and language which is the average rank for a national population. (T2 at 139-140) A standardized writing exam given to students in the fourth, eighth and tenth grades demonstrates that Hillsborough County students score higher than any of the other large school districts in the state. (T 2 at 140) Similar results are obtained on the High School Competency Test (HSCT). (T2 at 141) Scores for black students on the writing exam and HSCT show that Hillsborough County students outperform state averages for those tests. (T2 at 141)

177. A voluntary test taken by about 47% of seniors in high school--the Scholastic Assessment Test--has consistently produced results that place Hillsborough County students above national and state averages. When the scores are analyzed by race, the same result is shown. Black students in Hillsborough County outperform state and national norms. (T2 at 141)

178. In attempting to evaluate how,well the school system is educating all of its students, Dr. Armor examined standardized tests (the Stanford Achievement Test) given to fifth grade students in Hillsborough County in the spring of 1994 and the spring of 1995. Overall, black students scored 16 to 17 points lower than white students in reading and math. (T3 at 88-89; DX 1, chart 44) This represents approximately three-fourths of a standard deviation. (DX 1 at 21)

179. A nationwide study conducted in 1992 found that similar differences exist between blacks and whites at all grade levels in math and reading; the achievement gap ranges from

two-thirds to four-fifths of a standard deviation depending on the grade and test level. (DX 1 at 21)

180. However, when performing a regression analysis which used socioeconomic factors relating to family income, single or two parent families, and the educational background of the parents, the gap in scores between black and white students narrows considerably. (T3 at 90-101; DX 1, chart 45) Dr. Armor concluded that about 600 of the gap in the reading scores for black and white students and about 66% of the math scores can be explained by socioeconomic factors. (DX 1, chart 46)

181. Additionally, when the first grade test scores for the same group of students are added as an additional variable, almost 75% of the reading gap and 90% of the math gap is explained by these variables.[40] (DX 1 at 22-23, chart 47)

182. An analysis of Stanford Achievement Tests taken by eighth grade students revealed similar results. About 71-72% of the gap in reading scores and about 84-860 of the gap in math scores between black and white students in Hillsborough County for the same years was attributable to a combination of socioeconomic factors and first grade test scores. (DX 1 at 23, charts 48 and 49; T4 at 98-100)

183. Dr. Robert Crain, a witness called by plaintiffs, criticized some of the assumptions and methodology employed by Dr. Armor in arriving at his conclusions. (T6 at 157-207)

---

[40]First grade test scores are used as a predictor of student achievement or skills before entering school. (T3 at 96) However, the tests are given in the spring of the school year rather than the fall and therefore are the product of the first grade curriculum to an extent. (T6 at 253; 283; T7 at 186-87)

184. Dr. Crain disagreed with Dr. Armor's use of first grade test scores as predictors of student achievement entering first grade because the tests are given in the spring rather than in the fall. (T6 at 162-63) He did agree that a student's entry-level skills are important predictors of how well a student will perform on the fourth and eighth grade tests. (T6 at 253-53)

185. Dr. Crain also disagreed with Dr. Armor's use of neighborhood data to determine the variables of family income and educational level of parents because that data reflected averages rather than actual figures for a neighborhood and therefore would presumably include both black and-white families. (T6 at 168-73; 236) However, Dr. Crain uses neighborhood income in the studies he conducts. (T6 at 236) Dr. Crain also questioned whether family income and educational background could be remnants of the prior segregated school system. (T6 at 174-76)

186. Overall, Dr. Crain thought that Dr. Armor had overestimated the effects of socioeconomic factors on achievement test scores. (T6 at 192) Although he disagreed with some variables used by Dr. Armor, Dr. Crain did agree that the socioeconomic factors of free lunch and the number of parents at home were relevant and important variables. (T6 at 266) Using these factors, he obtained a line of regression similar to Dr. Armor's study. Dr. Crain did not determine the statistical significance of the differences between his study and Dr. Armor's (T6 at 270)[41]

---

[41] Dr. Crain disagreed with Dr. Armor's use of a "two-tailed" statistical model and felt that he should have used a "single-tailed" analysis. (T6 at 274) His preference for the single-tailed analysis was that "no one ...would expect blacks to score better in higher black schools." (T6 at 274) The reasons cited by Dr. Armor for use of the two-tailed analysis are morepersuasive and refute Dr. Crain's

187. Dr. Crain's study showed that fifth-grade black students attending the schools with over 40 percent black enrollment performed less well in than their counterparts at the schools with under 40 percent black enrollment. (T6 at 206-07) However, these differences occurred only with reading. There were no differences in math. (T6 at 281-82)

188. However, when Dr. Crain used the same variables as Dr. Armor he reached substantially the same results. (T6 at 265-66)

Academic Outcome

189. To evaluate how well the school system is doing in educating high school students, Dr. Armor examined grade averages and college plans as no standardized tests are taken by twelfth graders. White students have a 2.9 grade average; black students have a 2.3 grade average. Fifty-six percent of the high school seniors who were white planned to attend college as compared to forty-five percent of black students. (DX 1 at 24-25, chart 54)

190. When adjustment is made for socioeconomic factors and tenth grade achievement tests, Dr. Armor concluded that the grade average gap for black and white seniors would be only about .15 grade point. (DX 1 at 25, chart 55) After adjusting for socioeconomic factors, the difference between black seniors and white seniors in terms of college plans is practically negligible. (DX 1 at 25, chart 55)

Gifted Programs

---

assumption that black students in schools with a higher black enrollment will always score lower than those students in schools with a lower black enrollment. (T7 at 161-69)

191. As of October 1996, approximately 75% of the students enrolled in Hillsborough County gifted programs were white and approximately 9% were black. The remaining 16% were from other minority groups: 11% Hispanic, 4% Asian, and Indian and multi cultural, less than 1% each. (T2 at 151-52) While the number of black students in the gifted program is disproportionate to the number of black students enrolled in public schools, students must both apply to the gifted program and meet minimum criteria including attainment of a minimum score on a standardized test.

192. Until 1991, admission into gifted programs was set by state standards requiring an IQ test of 130 or higher. That year, the state adopted a plan to increase the number of minority gifted students and invited school districts to submit alternate criteria for admission. Hillsborough County elected to participate and submitted criteria under this program (referred to as "Plan B") which included an IQ score of 115 or higher together with demonstrated academic achievement and other characteristics typical principals are expected to follow-up with each student on an individual basis to give specific suggestions on how to stay in school or participate in alternate programs such as the GED program or adult education which meets the needs of the student. (T7 at 207)

198. The dropout rates for Hillsborough County public schools are the lowest in the state for similar large urban school districts. In the past five years dropout rates have averaged about 3½%. (T7 at 208-09)

199. Dr. Armor examined data for the high school graduating class of 1995 beginning when those graduates were in the eighth grade. The difference in dropout rates for blacks (15%) and whites (9%) is not significant. When adjusted for socioeconomic factors, that difference is negligible. (DX 1 at 24, charts 52, 53)

Suspension Policies and Rates

200. The School Board also tracks suspensions and expulsions by .sex, race, and age. The suspension rates for Hillsborough county are lower than state-wide averages in some areas and for some groups. (T7 at 234) The School District has out-of-school suspension programs as well as seven alternative school sites. Individual schools can elect to run an in-school suspension program; that decision is left up to the administration at each school. (T7 at 234-36)

201. Dr. Armor did not examine suspension rates but Dr. Stevens did. After examining four years of data (1990-1994), Dr. Stevens concluded that black students are suspended from school at disproportionately high rates. He found that in 1994-95 the suspension rate for black students was two to four times higher than the rate for white students depending upon grade level and the type of suspension. This data did not lead Dr. Stevens to infer racial discrimination, however. His criticism was that the School Board had not examined this data more closely on a school-by-school basis "to verify that disparities are not race-related." (PX 1 at 29-30)

GOOD-FAITH COMPLIANCE WITH COURT ORDERS

202. The parties disagree as to defendants' history of good faith compliance with court orders and what factors are relevant to this determination.

203. Defendants point out that for more than 25 years, defendants have complied with this Court's Orders to desegregate the public schools of Hillsborough County and to eradicate the previous illegal dual school system previously maintained. The record establishes that not. once during that

period of time have defendants been found in violation of any Court orders.[42]

204. During this period of time, the parties have regularly conferred, through their respective attorneys and desegregation experts, to ensure that the school system was moving forwards, not backwards, toward compliance with the Court's orders. (Prior R and R at 29 and n. 21)

205. At some point in the mid-1970's there were apparently several ex carte discussions between School Board staff and the District Judge formerly assigned to this case concerning whether the School Board needed to adjust boundaries at certain schools when racial enrollments changed. Plaintiffs learned of these conversations during a 1995 hearing on plaintiffs' motion to enforce court order when the School Board sought to admit testimony from John Heuer, former Assistant Superintendent, concerning these conversations. The undersigned ruled this testimony inadmissible on the basis of plaintiffs' objections .[43]

206. However, during the unitary status hearing, plaintiffs sought to introduce this testimony on the issue of defendants' good-faith compliance. Dr. Heuer testified that on a couple of occasions between 1972 and 1974 he received guidance from the Court, or the Court's law clerk, concerning

---

[42]There is, of course, the plaintiffs' motion to enforce court order filed in 1994 which remains pending before the Court following entry of the June 1995 Report and Recommendation recommending that the motion be denied. However, the Court noted in its subsequent referral order that the motion and recommendation "would be rendered moot upon a finding of unitary status." (Dkt. 709 at 3)

[43]See Prior R and R at 22 n

what to do about schools where the boundaries had not changed but the racial composition of the school had changed. He was told that "if [the school board] had not created the problem, [the school board] did not have to go back necessarily and correct it." (T7 at 17) Notwithstanding this advice, defendants did their best to try to improve the race ratios when possible, taking into consideration the distance factor for transportation and the burden it placed on the students. (T7 at 18-22)

207. Although the testimony on this point is not entirely clear, it appears that these discussions consisted of (1) one or two face-to-face meetings with the Court, Mr. Heuer, possibly Raymond Shelton, then Superintendent,[44] and Crosby Few, counsel for defendants, and (2) a couple of telephone conversations between Mr. Heuer and the Court's law clerk. These discussions were initiated by the Court or the law clerk, not defendants. (T7 at 11-16, 50)

208. Both the former and the current Superintendent of Schools testified at the unitary status hearing. Dr. Walter Sickles served as Superintendent from 1989 to July 1996 when he was replaced by Dr. Earl Lennard. Dr. Sickles had been employed by the School Board in various capacities beginning in 1969. Although he believed that the school system had become unitary in the early 1990's he did not suggest moving in that direction at that time because he felt that the obtaining court approval for the middle school plan should have priority. Dr. Sickles also believed that a move to end court supervision at that time would be opposed by plaintiffs and instead aimed at working with plaintiffs towards adoption of the middle school plan in the 1991 Consent Order. (T7 at 99-124)

---

[44]Mr. Shelton is now deceased.

209. Dr. Lennard, appointed Superintendent in July 1996, has been employed by the School Board since approximately 1964. He previously served as Deputy Superintendent and Assistant Superintendent for Administration. He testified that he strongly feels a "moral and legal obligation on the school system to continue a desegregated school system." (T7 at 238-39) However, he has not developed any specific plans regarding what transportation policies he would recommend if unitary status were found other than continuing the activity buses. (T7 at 239-40)

210. Doris Reddick, the only black School Board member, was elected Chair by her colleagues. All seven of the School Board members run from districts but are elected county-wide. Ms. Reddick testified that the School Board had never taken a formal vote or held public hearings on whether to seek unitary status. When the Court's Referral Order was entered, School Board members discussed the issue with counsel in terms of the unitary status issues. Ms. Reddick testified that she did not think that the School Board should be released from supervision now or at "any other time that I see in the future." She explained that "I am not sure we have actually crossed over the wall, and I mean the wall of equal distribution of everything that the unitary system calls for." (T5 at 27-30) However, when asked whether the School Board had developed any contingency plan to operate if unitary status is granted, Ms. Reddick indicated that any plan would maintain a system in which "all children will receive equal education." (T5 at 26)

211. The other School Board members who testified at the hearing, Carolyn Bricklemyer, Candy Olson, Yvonne McKitrick, Glenn Barrington, and Carol Kurdell, expressed no misgivings about whether Hillsborough County schools are unitary or the intent and ability of the School Board to continue

a desegregated school system while receiving input from all members of the community. (T5 at 10-12, 16, 32, 39-40)

212. Mr. Manning, the lead plaintiff in the case, agreed with Ms. Reddick that the School Board had not yet completely eliminated the vestiges of segregation. He was concerned about the schools with increased black enrollments[45] as well as the fact that black students were bused more often than white students. Mr. Manning did not think that there should not be any schools in the county with black student enrollments of 80% or more. He stated that there was a feeling of distrust and unhappiness with the School Board in the black community, and referred to reading two years ago about "secret meetings that were held between the School Board and the judges," an apparent reference to Mr. Heuer's testimony discussed above. However, Mr. Manning stated that he was consulted about the middle school plan proposed to the court and that he agreed with it as it was fully endorsed by counsel, the Legal Defense Fund. (T6 at 113-33)

213. Joanna Tokley, a 22-year member of the Urban League who is currently President and CEO, testified on behalf of plaintiffs that she did not feel that the School Board was ready to be released from court supervision. (T3 at 187-89) She expressed concern that the inner-city schools might be passed over in terms of renovation projects and that low enrollments might cause the loss of instructional or library staff. Ms. Tokley thought that there were still some employees who were insensitive and made improper comments to children who qualified for free lunches. She recounted a incident involving

---

[45]Mr. Manning agreed that some parents of black students do not want their children transported out of schools which are majority black but he felt that those parents were concerned more with convenience rather than the quality of education. (T6 at 126)

her godson who played basketball against East Bay High School in 1995.[46] (T3 at 180-89)

214. Ms. Tokley served on the Biracial Advisory Committee for ten years beginning in 1974 but resigned because she disagreed with its limited role. She felt that sometimes boundary changes were "rubber stamped" by the Committee and the School Board despite the fact that she and a minority of the Committee members voiced disagreement with those recommendations at the School Board hearings. (T3 at 182-84)

215. Ms. Tokley continues to be involved with the school system, however. She served on the Education Committee of the Chamber of Commerce and the Goals 2000 committee. She presently serves on the School Board's Overcrowded Schools Task Force. Additionally, she directs Urban League programs in about 32 Hillsborough County schools which provide self-esteem and behavioral modification programs for students of all races as well as tutoring and other programs. (T3 at 170-77)

CONCLUSIONS OF LAW

Plaintiffs submit that the Court must resolve four legal issues: (1) outstanding legal issues regarding defendants' prior compliance with existing orders; (2) whether a finding of unitary status is appropriate, absent modification of the 1991 Consent order; (3) whether defendants have demonstrated that no remaining vestiges of the prior de jure segregated school system exist; and (4) whether defendants have demonstrated

---

[46]Ms. Tokley also testified about other incidents involving family members in the mid to late 1970's which she felt indicated disparate treatment. (T3 at 178-81)

good-faith compliance with both the 1971 Orders and the 1991 Consent Order.

Defendants submit that all these issues are subsumed within the unitary status inquiry. However, these issues will be evaluated as suggested by plaintiffs.

Plaintiffs' 1994 Motion To Enforce Court Order Should Be Denied As No Violations Have Been Shown

Plaintiffs have only once alleged that defendants violated this Court's orders, in 1994. Those allegations were fully addressed in the Prior Report and Recommendation dated June 23, 1995 and the proposed findings and conclusions made therein are incorporated here by reference.

This is a threshold issue which remains pending before the Court and should be resolved prior to a determination of unitary status. Cf. Bradley v. Pinellas County, 961 F.2d 1554, 1558 n.9 (11th Cir. 1992).[47] Therefore it is recommended that the Court conclude that defendants have not violated either of the 1971 Orders or the 1991 Consent Order as alleged by plaintiffs in their prior motion to enforce court order. No subsequent developments, either factual or legal, justify reconsideration of those recommended findings and conclusions

A Finding of Unitary Status Is Not Barred By the 1991 Consent Order

---

[47]Of course, the burden is on plaintiffs in their motion to enforce to demonstrate that defendants have violated the Court's orders. In a unitary status determination, the School Board has the burden of establishing it has eliminated the vestiges of the prior de jure segregated school system and has complied in good faith with the Court's orders.

Plaintiffs contend that it is premature for the Court to makt a determination of unitary status because the terms of the 1991 Consent Order have not been fully met.

The 1991 Consent order approved and incorporated the Report of the Middle School Task Force. (Consent Order at 2-5) The Task Force Report addressed a restructuring of Hillsborough County schools to establish middle schools serving grades 6-8 to be implemented over a seven-year period.

In agreeing to the terms of the Consent Order, counsel for the parties "represented to the Court that in their opinion, the modifications set forth in this Agreed Order meet applicable constitutional standards and will continue the progress of the Hillsborough County public schools toward a unitary system from which all vestiges of past discrimination have been eliminated." (Consent Order at 2)

A district court unquestionably has the inherent power to grant a modification of a consent order in a desegregation case. Modification may be considered when (1) a significant change in facts or law warrants change and the proposed modification is suitably tailored to the change; (2) significant time has passed and the objectives of the original agreement have not been met; (3)continuance is not longer warranted; and/or (4) continuance would be inequitable and each side has legitimate interests to be considered. See Jacksonville Branch NAACP v. Duval County Sch. 978 F.2d 1574, 1578 (11th Cir. 1992) (citations omitted).

Attainment of unitary status is a material change in circumstance which could justify termination of court supervision over the School Board.

There are No Remaining Vestiges of the De Jure Segregated System

In a school desegregation case, "the court's end purpose must be to remedy the violation and in addition to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." Freeman v. Pitts, 503 U.S. 467, 489 (1992) (citation omitted). A school system has fulfilled its constitutional duty when it has complied in good faith with the court's desegregation decree since it was entered and has "eliminated the vestiges of past discrimination to the extent practicable." Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 248 (1991) (citation omitted).

A dual school system is one which has engaged in intentional segregation of students by race; a unitary system is one which has been brought into compliance with the Constitution. See id. at 246 Thus, the court must examine all facets of a school district that was once a dual system, both when ordering a remedy and when the later question is whether the district courts' remedial control should be modified, lessened, or withdrawn. See Freeman, 503 U.S. at 486.

In 1968, the Supreme Court identified those factors relevant to the unitary status inquiry as: student assignment, faculty and staff, transportation, extracurricular activities, and facilities. See Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 435 (1968). These Green factors must be considered in light of the school district's specific obligations under the Court's orders, in this case the 1971 Order and the 1991 Consent Decree. ,Sgg Missouri v. Jenkins, 515 U.S. 70, 100 (1995).

In addition, the school district must demonstrate its "goodfaith commitment to the entirety of a desegregation plan so that parents, students and the public have assurance against

further injuries or stigma." Freeman, 503 U.S. at 498. Further, the district court, in its discretion, may consider other facets of the school operations, such as the quality of education. Lockett v. Bd. of Educ. Of Muscogee County School, 111 F.3d 839, 843 n.l (11th Cir. 1997).

This Court has directed defendants in this case to address all of the Green factors, including the "quality of education being received by all students," as well as the "good faith commitment by the School Board." (Order of Referral at 4)

STUDENT ASSIGNMENTS

Where a school board has a history of practicing segregation, a district court must presume that substantially disproportionate racial compositions within the schools are constitutionally violative. To overcome this presumption, a school board must prove that the imbalances are not the result of present or past discrimination. See Lockett, 111 F.3d at 843 (citing Swann v. Charlotte-Mecklenburg Bd. Of Educ., 402 U.S. 1 (1974)).

However, the "constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." Swann, 402 U.S. at 24. Nor is a school board required to make adjustments in student attendance zones for racial imbalances caused by demographic factors. See Freeman, 503 U.S. at 494. "The' Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race." Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring).

Although the Swann Court did not further define what measure a court is to use in determining whether the racial composition of a school is "substantially disproportionate," the expert witnesses for both sides in this case have used the standard of a plus or minus twenty percent (200) deviation from the county-wide percentage of black and white school age children.

According to 1990 census data, twenty-three percent (23%) of Hillsborough residents between the ages of zero and seventeen are black; seventy-seven percent (77%) are white. As stated previously, the 1990 Census is the most recent data available. Both sides' experts have used schools with 40% or higher black student enrollment as the focus of any inquiry into substantially disproportionate race ratios although, in actuality, a 43% or higher figure would be more appropriate given the most recent census data.

There is no dispute that most Hillsborough County studentsattend public schools in which the percentage of black and white students is generally proportionate to the percentage of white and black school age residents of Hillsborough County. It is also evident that most of the county's schools have been racially balanced since 1971 when the Court ordered the School Board to dismantle the dual school system. The year following the 1971 Order, all of the public schools of Hillsborough County had been desegregated.

However, approximately ten percent of the 159 public schools, mostly elementary schools, reflect student enrollments in which the percentage of black students is substantially higher than the percentage of black children under age seventeen shown by the 1990 census data. All of these schools were racially balanced immediately following implementation of the Court's 1971 Order. A few of the schools crossed the 40% line in the five to ten years following the Court's 1971 Order. Most

of the schools were balanced until about ten years ago and have become out of balance since then.[48]

This Court, in its referral order, declined to adopt a specific percentage figure of what constitutes a racially identifiable school and concluded that "the better procedure is toconsider that this determination is entirely dependent upon local conditions." (Order of Referral at 5) , If, by this, the Court meant the racial make-up of the neighborhoods surrounding the schools, then the Court may find that none of the sixteen schools in question are racially imbalanced, at least when comparing the race ratios for the 1990-91 school year and census figures for 1990 for the tracts surrounding those schools, as noted previously.[49]

The evidence strongly points to residential housing patterns as the explanation for the change in racial composition of these schools. This explanation is especially persuasive when the racial enrollments of the schools are compared to the changing racial make-up of the neighborhoods in which these schools are located. The expert testimony and evidence supports the conclusion that the schools with the largest black student populations are located within attendance areas that have had the greatest increases in the number of black school-age residents.

---

[48]Also, most of the schools that plaintiffs point to as evidence of the prior dual school system had black student enrollments that were over 40% or approaching 40% when plaintiffs and defendants sought court approval to implement the middle school concept by modifying the desegregation plan outlined in the 1991 Consent Order. (Prior R and R, at 27, 32-35, 40)

[49]See supra paragraph 68.

The School Board has never, since the 1971 Order, drawn school boundaries or assigned students to separate schools on the basis of race. For those schools with current racial imbalances, changes in attendance areas have generally resulted in improving the racial balance, at least for the year immediately following the boundary change.[50] Those few instances in which the boundary changes have not improved the racial balance cannot be viewed as any effort by the School Board to return to the prior dual school system.

The School Board's evidence on this issue was essentially unrebutted by plaintiffs. Dr. Shelley, the demographic expert called by plaintiffs, did not perform any independent demographic studies but relied on the data assembled by Dr. Clark, the School Board's demographic expert. Dr. Shelley's testimony does not undermine the finding that demographic changes in the surrounding areas are the most likely cause for the racial imbalances present at about ten percent of the schools.

It is true that plaintiffs are not required to show that School Board action caused the racial imbalances at some of the schools. The burden was and is on the School Board to establish that the imbalances are not proximately traceable to past or current discriminatory School Board policies or actions. However, the School Board has met its burden with the testimony of Dr. Clark and Dr. Armor which is supported by reasonable assumptions and census data.

---

[50]Notwithstanding defendants' withdrawal of Dr. Clark's testimony addressing the effect of boundary changes (T2 at 57-64; 74-80), Dr. Miliziano's testimony, as well as Dr. Armor's supports this conclusion. (T1 at 43-61; 100-103; T3 at 33-49;53)(DX 3) Dr. Shelley, plaintiffs' expert, found that about onehalf of the boundary changes improved the racial balances the following year. (DX 2 at 9)

The School Board has met its burden of establishing that the current racial imbalance in these schools is not proximately caused by any unlawful School Board action, past or current, that assigns students to separate schools on the basis of race. See Freeman, 503 U.S. at 494.

The location of certain schools with below 40% black enrollment in the same cluster as the elementary schools with black enrollment of 40% or more is not evidence of any discriminatory motive or practice on the part of the School Board. Although plaintiffs have pointed in conclusory terms to the **possibility** of intra-cluster assignments to alleviate the racial imbalances of some of these schools, in most cases the attendance zones for the other schools are not immediately adjacent. Where they are adjacent, there is a natural barrier such as a road or railroad track. Most of the sixteen schools in question are surrounded by schools with black enrollments of close to or over 40% of the total student population. Moreover, although plaintiffs have alleged that the school system is not unitary as to student assignment, they have not proposed specific solutions to remedy what is alleged to be an on-going constitutional violation.

A school board's affirmative duty to desegregate does not require adoption of the most desegregative alternative available. Practicalities such as transportation (and funding) may properly be considered by a court in determining the scope of desegregation plans even though more ambitious. plans might achieve greater desegregation. See generally Lee v. Anniston City Sch. Sys., 737 F.2d 952, 957 (11th Cir. 1984).

Further,

> [w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the

> practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an everchanging pattern, one difficult to address through judicial remedies.

Freeman, 503 U.S. at 495.

The Court must also consider the parties' prior representations in this case. One of the stated goals of the Middle School Plan approved by both plaintiffs and the School Board and adopted by this Court in 1991 was **to retain a desegregated school system** (emphasis added). Plaintiffs have stipulated to this fact. (Prior R and R at 2, nn.3 & 6) A major objective of the cluster plan was to have neighborhood schools while maintaining a desegregated school system. (Prior R and R at 30) (citing Task Force Report) (T7 at 116)

In determining proposed attendance zones for the clusters, the School Board projected that the plan would improve the racial balance for some schools but cause racial imbalances to increase at others. Overall, however, the proposed attendance areas would increase the number of schools within the school system with student populations that were racially balanced. This plan was adopted by the School Board only after a series of public hearings, meetings with community leaders and organizations, and the full participation and approval of plaintiffs' counsel and their desegregation expert, Dr. Stevens. (Prior R and R at 6-7, 29-33)

Neither the 1971 Order nor the 1991 Consent Order required the School Board to periodically adjust the racial enrollment at particular schools on an annual or less frequent basis once the initial goal of desegregation of student attendance patterns was achieved. (Prior R and R at 15, 29-38)

Thus, although the School Board has not been obligated to maintain a particular racial balance at each school, it has utilized the ratios outlined in the 1971 Order as the "most acceptable and desirable form of desegregation" as a guide in formulating student attendance zones and in evaluating the impact of other School Board decisions on its mandate from this court.

The School Board has also adopted a magnet school program, a favored desegregative technique, and has devoted substantial resources to implementing and publicizing this program to students, their parents, and the community. It is true that some aspects of the magnet program remain to be implemented as this coming school year is the final year of implementation for the plan approved by the Court in the 1991 Consent Order. However, the magnet programs and schools are located in the inner city areas and are expressly designed to be racially balanced. The percentage of black students who may participate in magnet programs is 23% but this percentage may increase to 40% if an insufficient number of other minority students apply for the programs. Plaintiffs' contention that defendants are continuing to discriminate because of the policy that caps black enrollment at 23% ignores the federal requirement that magnet schools reflect the ethnic backgrounds of all minority groups within the county.

The Court in its 1971 order continued the requirement imposed in prior orders as to Majority to Minority (M to M) transfers permitting any student whose race constitutes the majority of students at a school to voluntarily transfer to the

school closest to his home in which his race is a minority of the students, with transportation provided if necessary. According to the School Board, no student has ever applied for a transfer under the M to M policy. Plaintiffs do not refute this evidence but contend that the School Board has not understood its obligations under this policy. To the extent that the School Board has not in the past publicized this policy, that was rectified more than a year ago.[51] If transfers are sought for other reasons, the School Board staff now takes the affirmative step of reviewing the application to see if the student would be eligible for an M to M transfer.

Although the absence of M to M transfer applications is troubling, the Court's 1971 Order did not require the defendants to solicit M to M transfers; they were only required to grant them if requested. There has been no violation of the Court's Order as to the M to M transfer policy. Also, Dr. Stevens testified that M to M transfers would not be statistically significant in reducing the racial imbalances at the sixteen schools in question.

On the whole, the School Board has demonstrated that its schools are unitary as to student assignment policies and practices and that the increased black enrollments at about 10% of the schools which are substantially disproportionate to the districtwide racial ratios are due to increased number of black school-age children residing in those neighborhoods. See, e.g., Freeman, 503 U.S. at 494 (court's 1969 desegregation decree was designed to achieve maximum practicable desegregation and achieved its goal in the first year of operation "before

---

[51]There is nothing in the record to indicate whether the School Board would continue the M to M transfer program if court supervision were lifted. The School Board may wish to address this issue in a supplemental filing with the Court.

dramatic demographic changes altered residential patterns"; "[f]or the entire 17 year-period the respondents raised no substantial objection to the basic student assignment system, as the parties and District Court concentrated on other mechanisms to eliminate the de jure taint"); Morgan v. Nucci, 831 F.2d 313, 320-21 (1st Cir. 1987) (finding of unitary status upheld despite existence of 13 schools in Boston school district with enrollments of one race comprising 80% or more of total enrollment at school); Stell v Bd. of Pub. Educ. for the City of Savannah, 860 F. Supp. 1563, 1583 (school district unitary despite the fact that 11 of 44 schools were 20 percentage points or more outside district-wide race ratios).

FACULTY AND STAFF ASSIGNMENT

The testimony presented by the School Board indicates that the faculty and staff at Hillsborough County public schools have been and remain desegregated.[52]

Plaintiffs have not disputed defendants' statistics or the evidence of vigorous recruitment of minorities but contend that certain schools exceed the system-wide race ratios by a significant percentage. The conclusions of Dr. Stevens and Dr. Armor differ as to whether the any schools deviate more than 15% from the district wide faculty average. Dr. Stevens identified twelve elementary schools that fit this category; Dr. Armor identified none. This difference is largely due to the fact that Dr. Stevens included non-certified staff within his calculations and Dr. Armor included only faculty. However, the School Board's 14% black faculty figure did not include staff. For this reason, Dr. Armor's conclusion is more reliable. Given

---

[52]In July 1971 the Court noted that faculty desegregation had been accomplished "at every school location in the 1970 school year." (July 1971 order at 8)

the absence of any schools which have a 15% deviation from the district-wide average, racial identifiability in faculty and staff assignments has not been demonstrated. See, eTa., S e , 860 F. Supp. at 1576; see also Flax v. Potts, 915 F.2d 155, 163 (5th Cir. 1990) (unitary status achieved by school board despite six schools with faculty and staff 20 percentage points or more from system-wide ratio).

Admittedly, the School Board has not achieved the goals it has pursued of having the same ratio of black and white teachers as the student body. Black student enrollment in the district is about 23%. - However, there is no dispute that recruitment of minority teachers has been and remains an important goal for the School Board.

Additionally, the percentage of principals and assistant principals who are black exceeds the percentage of black teachers and the school Board has an active mentoring program designed to provide support for instructional staff seeking advancement. About one of every six principals is black; more than one out of every five assistant principals is black.

The School Board has established by a preponderance of evidence that it has eliminated racial discrimination in hiring and assigning of faculty and staff. The public schools of Hillsborough County are unitary as to this Green factor.

TRANSPORTATION AND EXTRACURRICULAR ACTIVITIES

All public school students are entitled to transportation to and from school if they live two miles or more from their school. Race has no bearing on a student's right to transportation.

Although it is under no legal obligation to do so, the School Board also provides "activity buses" for students needing later transportation who participate in after-school activities.

There is no evidence of discrimination in providing transportation to students, including activities buses. Defendants have complied with this Court's orders regarding transportation of students.

It is true, as plaintiffs contend, that proportionately more black students are bused for desegregation than white students. By its very nature, the desegregation plan adopted by the court imposed a greater transportation burden on black students. While recognizing this fact, the Court found that its plan would result in busing fewer students, among other factors. (July 1971 Order at 74) of discrimination due to race. Extracurricular activities are provided primarily at the high school level. The School Board places no racial restrictions on a student's ability to participate in extracurricular activities. The testimony of Ms. King demonstrates her concern as the mother of a black high school student about cheerleader selection at one high school. However, the try-outs she attended resulted in several black students being invited to join the cheerleading squad.

Plaintiffs' desegregation expert, Dr. Stevens, did not point to any instances of discrimination in the extracurricular programs offered by defendants. Instead, Dr. Stevens suggested that sufficient .data was not maintained to enable defendants to ensure that this aspect of the school system was free from discrimination, such as records from individual schools instead of district-wide data about extracurricular participation.[53]

---

[53]Apparently, the School Board tracks participation in athletic activities at individual schools by race but does not do this

However, there is nothing in the Court's orders which required information of this sort to be maintained and speculation about what such records might reveal is insufficient ground to preclude a finding of unitary status.

The testimony shows that defendants have eliminated discrimination based on race in the areas of transportation and extracurricular activities and the court should so conclude. The Hillsborough County school system is unitary as to these two Green factors.

FACILITIES AND RESOURCE ALLOCATION

Although most new schools have been built in the suburbs, this is consistent with the county's growth patterns. When assigning students to a new school, the School Board has taken into account the projected race ratios. No new schools have been built with projected black enrollment of greater than 40%. Furthermore, when closing or converting schools, the School Board has taken into account the impact on race ratios and tried to improve the racial balance when reassigning students to other schools.

The School Board has also established that its allocation of funds and teacher resources is free from racial discrimination. Much of the budget comes from state and federal sources and the School Board is regularly audited to determine that it is in compliance with standards for use of those funds. Individual schools are funded on a per-pupil basis and the race of the student has no bearing on how funds are spent. Schools that are brought into the middle school cluster plan receive additional funds for that year. In recent years, total per capita expenditures have actually been higher at schools

---

with other extracurricular activities.

with a 40% or higher black enrollment. These are among the schools that receive additional funds from the federal government (known as Title I funds) due to the number of students who come from families who meet poverty level guidelines.

To the extent that overcrowding is included in the calculus of resource allocation, it is evident that overcrowding is an unfortunate reality at most schools in Hillsborough County. The total population of Hillsborough County increased by almost twothirds between 1970 and 1990. The number of public schools grew from 129 in 1971 to 159 in 1995. The degree of overcrowding varies at individual schools across the county. Plaintiffs introduced evidence that proportionately more of the schools that are racially imbalanced are above their FISH capacity when compared to the racially balanced schools. The evidence submitted by defendants shows how capacity is extended with portables but the School Board's evidence also suggests that five of the ten most overcrowded elementary schools are among the schools with a higher percentage of black students enrolled. This evidence is disturbing, but it does not demonstrate discriminatory conduct or policy on the part of the School Board. Evidence presented by defendants also indicated that the teacher-student ratios are lower at the schools having black student enrollments of 40% or more.

Defendants have demonstrated that the Hillsborough County school system is unitary as to the Green factors of facilities and resource allocation.

QUALITY OF EDUCATION

Quality of education, while "admittedly an amorphous concept", is a fundamental concern in any desegregation case. Freeman v. Mills, 942 F. Supp. 1449, 1461 (N.D. Ga. 1996), aff'd, 118 F.3d 727 (11th Cir. 1997). "If there is one common

thread in [Brown] and its progeny, it is the assumption by the federal judiciary of a role in which it can, by exercise of its equitable jurisdiction, compel a school districts which were once segregated by law to offer each of their children, irrespective of race, a quality of education which is substantially similar to that offered to all other children." Id. At the same time, "[e]nshrined in the Constitution is the promise of equal opportunity, not equal outcome."

As stated previously, none of this Court's prior orders have required defendants to implement specific programs addressing quality of education. The evidence presented indicates that the School Board has in the past regularly evaluated several areas of student performance in attempting to gauge its success in providing a quality education. It continues to do so at the present time, and there is every reason to expect that it will continue to monitor performance in the future and make adjustments in its programs where necessary.

The evidence on quality of education at the unitary status hearing focused on achievement tests, gifted programs, dropout and suspension rates and programs, and grade-point averages and college plans for graduating seniors, with reference to results achieved according to the race of the student.

Defendants regularly monitor dropout and suspension rates and have implemented programs to prevent dropouts which include providing extra counselors and teachers at the high school level. Although there is a disparity between dropout and suspension rates for whites and blacks, dropout rates for this school district are the lowest in the state for similar urban school districts (about three and one-half percent). Much of the gap in dropout rates can be explained by socioeconomic factors, according to Dr. Armor.

Although not required by state law to do so, defendants increased minority participation in the gifted program by adopting "Plan B" as soon as the state permitted school districts to devise alternate admission criteria by lowering the minimum score applicants needed to attain on a standardized test. Dr. Stevens stated that this policy had increased black enrollment in the gifted program in recent years.

Of the high school seniors who planned to attend college, 56% were white and 45% were black. The average grades for black and white students varied by six-tenths of a point. Black students in Hillsborough County meet or exceed state and national norms for several standardized tests.

Achievement tests for fourth and eighth graders show a gap between white and black students but these differences occur nationwide and are not confined to the Hillsborough County school district. Dr. Armor concluded that most of the difference was due to socioeconomic factors (poverty level, family income, one or two parent families, and the educational background of the parents). Plaintiffs' expert, Dr. Crain, disagreed with some of Dr. Armor's methodology and assumptions but ultimately agreed that socioeconomic factors probably explained most of the gap in math, but not in reading.

The evidence indicates that any disparity in achievement among students is not due to the effects of the prior segregated school system but rather to a myriad of other factors, largely socioeconomic. To require the School Board to obtain equal outcomes for all students is unrealistic. This Court's equitable powers are limited to remedying past constitutional violations.

The School Board is doing a reasonably good job of providing equal educational opportunities for all students. More importantly, it is evident that the School Board and Superintendent and staff candidly recognize that there are

deficiencies that need to be addressed and that input and involvement from all members of the community are needed to remedy these deficiencies. Any disparities that exist are not the result of the prior segregated system.

"[N]umerous external factors beyond the control of the [School board] and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus." Jenkins, 515 U.S. at 102 (fact that Kansas City school district was at or below national norms of achievement in some grades was not justification for court in desegregation case to require defendant school board to continue to fund quality education programs); see also Keyes v. Congress of Hispanic Educators, 902 F. Supp. 1274, 1299 (D. Colo. 1995) (racial/ethnic differences in discipline, participation in gifted programs, dropout rates and achievements, among other facets of school operation, not vestiges of dual school system existing 25 years ago; "[t]here are too many variables, including societal and socioeconomic factors, to infer causation from prior unconstitutional conduct"), appeal dismissed, 1997 WL 408050 (10th Cir. July 18, 1997).

GOOD-FAITH COMPLIANCE

In Freeman, the Supreme Court explained the importance of good faith in evaluating whether a school board should be released from court supervision:

> [A] school district [must] show its good-faith commitment to the entirety of a desegregation plan so that parents, students, and the public have assurance against further injuries or stigma . . . . [T]he good-faith compliance of the district with the court order over a reasonable period of time is a factor to be considered in deciding whether or not jurisdiction [can] be

> relinquished . . . . A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new de jure violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.

Freeman, 503 U.S. at 498 (citations omitted).

The Court must consider the testimony of various witnesses called on behalf of plaintiffs who testified that the School Board is not ready to be released from the Court's supervision. One of those witnesses was the School Board Chair, Doris Reddick, as well as the lead plaintiff in this case, Andrew Manning. Although they did not point to any specific examples, both Ms. Reddick and Mr. Manning voiced concern about what might happen in the future if Court supervision ended.

However, these opinions and the anecdotal evidence offered by plaintiffs are outweighed by the long history of compliance with the Court's Orders and the substantial evidence presented by defendants in support of unitary status.

Plaintiffs also contend that Dr. Heuer's testimony about the alleged ex parte conversations between the Court and defendants in the 1970's demonstrate defendants' lack of good-faith compliance in that "major decisions about school desegregation are based on one-time conversations, which are not clearly articulated and memorialized in court orders." (Dkt. 796 at 65) According to Dr. Heuer, the Court advised that it was not necessary to do anything in response to changes in racial enrollments at individual schools if defendants had not caused the imbalances. It is evident that the defendants tried to improve the racial balances when making boundary changes and opening and closing schools. If this advice was indeed given, there is no

inconsistency between the advice and the Court's Orders. These ex parte conversations, while unfortunate, were not initiated by defendants and do not demonstrate a lack of good faith on the part of defendants in complying with the Court's orders.

Plaintiffs also take issue with the fact that the School Board did not initiate the unitary status determination by taking a formal vote or holding public hearings but instead responded to this Court's Order directing the parties to present evidence on the unitary status issue. The fact that this inquiry was initiated by the Court, instead of defendants, is not indicative of a lack of good faith on the part of defendants. If anything, it indicates defendants' commitment to this Court's prior orders and the duties imposed by those Orders. Further, after the Court's Order was entered, defendants filed a Statement of Position which showed a readiness to seek unitary status. (Dkt. 728)[54]

The School Board has complied in good faith with this Court's desegregation orders for quite a long period of time. The testimony of the most School Board members, as well as the current Superintendent and those responsible for various facets of school operation demonstrates that defendants have accepted the principle of racial equality and will not revert back to a dual

---

[54]Defendants stated that after reviewing the history of the case, the relevant court decisions, and aspects of the operations of the school system relevant to unitary status, "[d]efendants represent to the Court that the Hillsborough County School system is, and for some time, has been unitary. The Defendants therefore ask the Court to treat this Response as their request for a declaration that the system of public schools operated by the [School Board] is unitary under governing legal standards.

school system.[55]

CONCLUSION

From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. See Dowell, 498 U.S. at 247. This precept was underscored by Justice Anthony Kennedy who authored the majority opinion in Freeman:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course . . . . [O]ne of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution. Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure desegregation have been

---

[55]Plaintiffs contend that the defendants have failed to establish unitary status as to any Green factor as well as quality of education and good-faith compliance. Efforts to mediate the issues raised in the 1994 motion to enforce were unsuccessful. The Court's ruling on the unitary status issue, whatever that may be, will likely trigger another round of appellate litigation. It is unfortunate that the parties have been unable to resolve--or at least narrow--the legal issues in dispute. They may not be as far apart as their court filings suggest. (See, e.g., Dkt. 796 at 85)

> eliminated. **It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility.**

503 U.S. at 490 (emphasis added).

The Hillsborough County public school system is by no meansperfect, but it is in reasonably good hands. No one can predict with certainty what lies ahead if the School Board is released from court supervision. However, "a fear that a system may resegregate in the future, absent credible evidence to support those fears, does not justify a federal court's continued monitoring of the system." Stell, 860 F. Supp. at 1583 (citation omitted).[56]

The question remains whether this court must or should maintain jurisdiction over this case pursuant to Youngblood v. Bd. of Public Instruction, 448 F.2d 770 (5th Cir. 1971). In Youngblood, the district court, sua sponte, dismissed a school integration case after finding that the school system was desegregated and unitary. Plaintiffs urged on appeal that rather than dismissing the case the court should have maintained the

---

[56]However, if the Court has concerns about whether defendants have desegregated the elementary schools to the maximum extent practicable, continued court supervision over student assignment could be retained while relinquishing jurisdiction over the other aspects of school operation as long as remedial action in the other areas is not necessary to achieve unitary status in the area of school assignments. A finding of the School Board's good-faith commitment to the entirety of a desegregation plan would also have to be made. See Freeman, 503 U.S. at 496-97 (incremental declaration of unitary status may be appropriate in certain circumstances).

case on the inactive docket and required the school district to file status reports. The former Fifth Circuit agreed and vacated the dismissal order. It remanded the case to the district court which was ordered to (1) reinstate the action and retain jurisdiction for not less than three school years; (2) require the school district to file semi-annual reports; and (3) not dismiss the action again without providing notice to plaintiffs and an opportunity to show cause why dismissal of the case should be further delayed. See id..

Youngblood, which is binding authority in this circuit,[57] has been interpreted to require a "three-year transitionary period" after a declaration of unitary status. Flax v. Potts, 725 F. Supp. 322 (N.D. Tex. 1989), aff'd and remanded, 915 F.2d 155 (5th Cir. 1990). In Lee v. Etowah County Bd. Of Educ., 963 F.2d 1416 (11th Cir. 1992), the Eleventh Circuit interpreted Youngblood more narrowly and held that after a school system has implemented a desegregation plan the district court must retain jurisdiction for a sufficient time--not less than three years--after which it may hold a hearing to determine if unitary status has been achieved. See id. at 1421.

Due to what may be an ambiguity in the law,[58] and

---

[57]See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

[58]Compare Dowell, 498 U.S. at 248 ("[A] federal court's regulatory control of [public school] systems [should] not extend beyond the time required to remedy the effects of past intentional discrimination.") (citations omitted) with Freeman, 503 U.S. at 490 ("[S]o too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance. A transition phase in which control is relinquished in a gradual way is an appropriate means to this end.")

because the parties have not briefed the issue of whether a transition phase is necessary after unitary status is attained, the parties shall do so within the time period for filing objections to the Report and Recommendation.

It is therefore **RECOMMENDED:**

(1) For the reasons previously stated, this Court should find that the defendants have demonstrated that the public school system of Hillsborough County has attained unitary status and should be released from Court supervision pursuant to such further Orders as may be appropriate under the circumstances.

/s/
ELIZABETH A. JENKINS
United States Magistrate Judge

DATED: August 26th, 1997.

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. § 636(b)(1).

Copies to: Counsel of Record
Hon. Elizabeth A Kovachevich, Chief Judge

Arguably, the showing of a good-faith commitment to the entirety of a desegregation plan would make a transition phase unnecessary. See Freeman, 503 U.S. at 498.

Appendix 1*

POPULATION IN HILLSBOROUGH COUNTY 1970-1990

All Persons

Year	Total	White	Black	Other	Spanish Origin (Any race)
1970	490,265	422,119	66,648	1,498	38,717
1980	646,960	546,575	86,464	13,921	64,199
1990	834,054	690,352	110,283	33,419	106,908

Persons Age 0-17

1970	164,278	135,344	28,527	407	**
1980	176,030	138,945	33,007	4,078	17,762
1990	202,274	152,900	39,163	10,211	28,806

*Taken from DX 2 at 13, W.A.V. Clark's report on Demographic Change And School District Impacts In Hillsborough County (June 1996).

**no data

Appendix 2*

TABLE OF SCHOOL ATTENDANCE ZONE 0-17 AGE RESIDENTIAL POPULATION COMPOSITION FROM CENSUS TRACT AND BLOCK STATISTICS, 1970-1990

School area	1970 **		1980		1990	
Cleveland	1657/46	(2.8)	1544/639	(41.3)	1578/654	(41.4)
Edison	1788/343	(19.2)	1463/584	(39.9)	836/590	(70.5)
Graham	1687/347	(22.2)	1288/462	(35.9)	1220/523	(42.9)
Oak Park	1649/117	(7.1)	1703/664	(39.0)	1580/897	(56.8)
Robles	2247/292	(13.0)	2496/781	(31.3)	2875/2054	(71.4)

*Taken from DX 2 at 16, W.A.V. Clark's report on Demographic Change And School District Impacts In Hillsborough County (June 1996).

** Total, black and percent black resident population

Appendix 3*

TABLE OF SCHOOL ATTENDANCE ZONE 0-17 AGE RESIDENTIAL POPULATION COMPOSITION FROM CENSUS TRACT AND BLOCK STATISTICS, 1980-1990

School area	1980 **		1990	
Cahoon	1882/396	(21.0)	2015/677	(33.5)
Clair Mel	3211/523	(16.3)	2832/1112	(55.1)
Foster	1397/438	(31.3)	1215/637	(52.4)
Shaw	2330/312	(13.4)	2696/911	(33.8)
Sulphur Sprgs	1600/242	(15.1)	2771/1431	(51.6)
Witter	1523/267	(17.5)	1809/743	(41.1)
West Tampa	1465/305	(20.8)	1379/436	(31.6)
Dowdell Jr	7494/2070	(27.6)	6572/2584	(39.3)
Van Buren Jr	10998/1613	(14.7)	12583/4983	(39.6)

*Taken from DX 2 at 17, W.A.V. Clark's report on Demographic Change And School District Impacts In Hillsborough County (June1996).

**-Total, black and percent black resident population

Note: Van Buren includes all of the area of Sligh but only junior high students attend Van Buren.

Report and Recommendation of Magistrate Judge
June 23, 1995

United States District Court, M.D. Florida.

Andrew L. MANNINGS, et al., Plaintiffs,
v.
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, Florida (formerly Board of Public Instruction of Hillsborough County, Florida), et al., Defendants.

No. 58-3554-CIV-T-17A.

June 23, 1995.

Marianne Engelman Lado, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York, NY, Victor A. Bolden, Wiggin & Dana, New Haven, CT, Warren H. Dawson, Dawson & Griffin, P.A., Tampa, for Andrew L. Manning, a minor, by his father and next friend, Willie Mannings, Shayron B. Reed, by his father and next friend, Sanders B. Reed, Sandra E. Reed, by her father and next friend, Sanders B. Reed, Nathaniel Cannon, minor, by his father and next friend, Nathaniel Cannon, Sr., Norman Thomas Cannon, minor, by his father and next friend, Nathaniel Cannon, Sr., Tyrone Cannon, minor, by his father and next friend, Nathaniel Cannon, Sr., Darnel Cannon, minor, by his father and next friend, Nathaniel Cannon, Sr., Gail Rene Myers, a minor, by her father and next friend, Randolph Myers, plaintiffs.

Thomas M. Gonzalez, Thompson, Sizemore & Gonzalez, P.A., Walter Crosby Few, Few & Ayala, P.A., Tampa, for Board of Public Instruction of Hillsborough County, FL, Clyde McLeod, AL Chiaramonte, John E. Coleman, member of Board of Public Instruction of Hillsborough County, FL, Marvin Green, J. Crockett Farnell, Supt., Hillsborough County, FL, School Board

of Hillsborough County, Formerly Board of Public Instruction of Hillsborough County, Florida, defendants.

REPORT AND RECOMMENDATION

JENKINS, Magistrate J.

*1 THIS CAUSE comes before the Court on Plaintiffs' Amended Motion to Enforce Court Order and Consent Order and for Further Relief and Memorandum (docs.601, 602), and Defendants' Response (doc. 605), Plaintiffs' Proposed Findings of Fact and Conclusions of Law (doc. 688), Defendants' Proposed Findings of Fact and Conclusions of Law (doc. 689) and the other submissions of the parties pertinent to the motion.[1]

An evidentiary hearing was held on October 24 and was concluded on November 22, 1994. Thereafter, the parties were ordered to mediation in an effort to resolve their disputes. No settlement was reached and on April 20, 1995 closing arguments were presented.

Plaintiffs ask that the Court 1) enforce the October 24, 1991, Consent Order and the May 11, 1971, Opinion and Order by requiring Defendants to take such steps as may be necessary to prevent the establishment and operation of West Tampa Elementary School, part of the recently implemented Jefferson Cluster, as an additional racially identifiable black school in Hillsborough County in the 1994-95 (and succeeding) school years; 2) require Defendants to take immediate effective steps to desegregate currently existing racially identifiable schools;

---

[1] This matter was specifically referred to the magistrate judge by Order of the Honorable Elizabeth A. Kovachevich, United States District Judge.

and 3) require Defendants to comply with the Consent Order and 1971 Order in the formulation and implementation of the remaining cluster assignments pursuant to their middle school plan.[2]

For the following reasons, the amended motion to enforce should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

On May 11, 1971, the Court entered an Order requiring the Hillsborough County School Board to prepare and submit for approval a comprehensive plan for desegregating the school system ("1971 Plan").

On July 2, 1971, the Court approved for implementation the submitted comprehensive plan and retained jurisdiction to take further action as necessary. The 1971 plan was designed to desegregate student enrollment in grades 1-12, as required by the Court; kindergarten was not included nor was pre-school.

The 1971 Plan required the conversion of twelve formerly all-black "inner city" elementary schools[4] to single-grade attendance centers serving the 6th grade. Each

---

[2]Plaintiffs also sought to require Defendants to modify the format of their annual reports, but the parties indicated during the course of the hearing that the issue has been resolved.

[3]Unless otherwise indicated, the facts in this section are those to which the parties stipulated prior to the evidentiary hearing on plaintiffs' amended motion to enforce. (doc. 657, p. 11-20)

[4]Bryan, Carver, College Hill, Cuesta, Dunbar, Jackson Heights, Lomax, Meacham, Orange Grove, Potter, Shore and Williams.

elementary grade-level (1-5) attendance area of each of these formerly all-black elementary schools was divided into two to five "satellite areas."[5] Students residing in each of these "satellite areas" were assigned to attend a formerly white school, to which they were transported for grades 1-5.

By October 27, 1971, Defendants had desegregated all Hillsborough County schools. There were no majority-black schools and only one school, Lee Elementary, had more than a 40% black student population. (T2-53-54)[6]

Each year following implementation of the 1971 Plan, the School Board filed at least two reports with the Court and furnished copies of the reports to Plaintiffs. The first report (usually submitted in the fall) provided enrollments by race and grade and faculty assignments by race at each school serving grades 1-12 in the system. The second report enumerated changes in student assignment, if any, proposed for the following school year.

***2** The student assignment report included, *inter alia,* boundary changes occasioned by overcrowding and student assignment modifications necessitated by the construction of new schools. The reports included projections of anticipated enrollments, by race, at schools affected by the proposed changes.

---

[5]A satellite zone is an area which is not contiguous with the main attendance zone surrounding a school. May 11, 1971 Order, p. 29, n. 41.

[6]References to the transcript of the evidentiary hearing held on October 27, 1994 (doc. 663) and concluded on November 22, 1994 (doc. 671) are indicated as "T1" or "T2", respectively, followed by the page number.

At least since January 14, 1975, the Court has not directed the School Board to prepare a supplemental plan or to take any action with respect to the racial composition of any of its schools, including, but not limited to, schools whose enrollments were more than 50% black.

Plaintiffs have not, from the date of implementation of the 1971 Plan until June, 1994, filed any written objections with the Court respecting the actual or projected enrollments of any schools in Hillsborough County, including schools whose enrollments were more than 50% black.

Plaintiffs did object in 1980 to the closing of George Washington Junior High School and Glover Elementary School (for reasons other than racial composition), proposed actions which were approved by the Court after a hearing on plaintiffs' objections.

Plaintiffs also objected in 1990 (for reasons other than anticipated racial composition of enrollments) to the proposed conversion of Blake 7th-grade center to a magnet high school, a proposal which the Court disapproved (without prejudice to subsequent resubmission as part of a comprehensive restructuring plan) by Order of January 23, 1991.

The School Board has not requested a finding of partial or full unitary status by the Court and/or the vacation, in whole or in part, of the previous Orders of the Court. The Court has therefore not had occasion to make, nor has it made, a determination whether all vestiges of the prior racially discriminatory dual school system in Hillsborough County have been eliminated to the extent practicable.

Since the 1977-78 school year, the School Board has made more than 300 modifications in student assignments to relieve overcrowding, to accommodate the opening of newly

constructed facilities, or for other reasons, but not for the purpose of affecting the racial ratio of a school.

When making assignment changes to relieve overcrowding or to accommodate new construction, the School Board has taken into account the racial mix within the new boundary and the effect of the boundary changes on the enrollment ratios at the affected schools.

In addition, in making assignment changes to deal with problems of overcrowding or with new school construction, the district, where practicable, reassigned, or divided and partially reassigned, existing satellite zones (those originally created in 1971) in a manner that moved enrollments toward the system-wide ratio.

In particular, when the School Board constructed a new facility in a suburban area having a small resident black student enrollment within the contiguous zone created surrounding the facility, it would reassign pre-existing satellite zones to increase the number of black students assigned to the new facility.

*3 In modifying student assignments to relieve overcrowding or in connection with the opening of a new facility, the School Board has since the 1975-76 school year created non-contiguous zones or satellites in at least seven instances.

The School Board has never created a new non-contiguous or satellite zone solely to alter the racial enrollment ratio at a school, including those schools with majority-black enrollments.

Since 1986, the School Board has not initiated any boundary changes, (not otherwise being considered for reasons such as overcrowding or the opening of a newly constructed

school facility) for the purpose of altering the racial enrollment ratio at a school, including at schools that had majority-black enrollments.

In November 1989, Superintendent Walter Sickles appointed a task force to investigate and make recommendations for reorganizing the school system and implementing a middle school program.

One of the stated goals of the task force was to retain a desegregated school system.

In late 1990 or early 1991, the School Board invited plaintiffs and their counsel to consider the tentative middle school plan being developed by the Task Force.

During the first six months of 1991, several meetings between school board staff and plaintiffs' counsel took place (concerning the middle school plan). Plaintiffs' educational and desegregation consultant, Dr. Leonard Stevens, also participated in several of the meetings including meetings held on July 16, 1991.

Following the July 16, 1991 meeting, a formal report entitled "Middle School Task Force Report 3, July 1991" (Task Force Report) was submitted to and approved by the School Board and subsequently transmitted to plaintiffs' counsel on August 20, 1991.

More than two months later, the Task Force Report was attached to and made part of the Consent Order submitted and executed by counsel for plaintiffs and defendants which was approved and entered by the Court on October 24, 1991. (PX 48)

The Task Force Report proposed modifications (projected to be implemented over a seven-year period) of grade organization and student assignments in the Hillsborough County school system to accommodate the establishment of middle schools. (Consent Order, p. 2)

Implementation of the middle school concept involved creating attendance "clusters" which grouped elementary and middle schools around the high school which those students would ultimately attend. Each of the 17 clusters was thus named for the high school which was the basic unit, e.g. the "Jefferson [High School] Cluster". (Task Force Report, p. 10)

As described in the Task Force Report, the Jefferson Cluster was to be implemented between 1996 and 1998.

Subsequent to the entry of the Consent Order, the School Board decided to implement the Jefferson Cluster in the 1994-95 school year.[7]

The Task Force Report indicated that the Jefferson Cluster was to be implemented by changing the grade structure of West Tampa Elementary School from a K-6 facility to a K-5 school.

***4** However, two changes in the School Board's 1994-95 implementation plan for the Jefferson Cluster differed from the plan in the 1991 Task Force Report.

The implementation plan, which was approved by the School Board and carried out pursuant to the parties' Agreed

---

[7]Apparently, delays in construction in the East Bay Cluster resulted in a decision to implement the Jefferson Cluster earlier than anticipated. (T1-77)

Interim Order, provided that West Tampa Elementary School (West Tampa) will continue to operate as a K-6 school until the "Blake/Just" or "Downtown" Cluster is implemented.[8]

Only part of the sixth-grade students, those who walked to school, were retained at West Tampa. Those students were projected to attend Just Middle School which is part of the Blake (downtown) cluster and Just was not ready to accept elementary students yet because the Blake cluster had not been implemented. (T2-122-123)

Furthermore, although the Task Force Report envisioned that the area of the Jefferson Cluster formerly assigned as a satellite zone to Mabry Elementary School would be assigned to Dickenson Elementary, that satellite zone is instead assigned to Bay Crest Elementary School under the 1994-95 implementation plan.

As of October 19, 1993, there were one hundred fifty-one (151) public schools in Hillsborough County: 111 are elementary schools, 26 are junior high/middle schools and 14 are high schools. (PX 23)[9] Defendants state that there are now one hundred sixty (160) public schools in Hillsborough County.

Approximately sixteen (16) of the public schools, primarily elementary schools, have black student enrollments of 40% or more. (doc. 601, p. 2)

---

[8]At closing argument on April 20, 1995, defendants stated that the temporary measure of retaining grade 6 at West Tampa will end at the close of the school year in 1996.

[9]Exhibits introduced by plaintiffs at the evidentiary hearing will be indicated by the letters "PX"; those introduced by defendants will be indicated by the letters "DX".

The percentage of black students enrolled in the school system has remained fairly stable since 1971 at around the 20% level; currently the system-wide percentage of black students attending elementary schools is about 23%, about two percentage points higher than in 1971. (T1-110).

II. DISCUSSION

In their amended motion to enforce, Plaintiffs seek to require Defendants to take affirmative steps to prevent the establishment and operation of West Tampa Elementary School as an additional racially identifiable black school in Hillsborough County in the 1994-95 (and succeeding) school years. Plaintiffs contend that Defendants did not comply with either the 1971 Order or the 1991 Consent Order in implementing the Jefferson Cluster in the 1994-95 school year. Further, plaintiffs state that Defendants have a continuing affirmative duty to prevent the creation or maintenance of any racially identifiable schools within Hillsborough County, regardless of whether Defendants fully complied with the 1971 Order in directing the immediate desegregation of Hillsborough County public schools.

As of December, 1993, West Tampa had a black student enrollment of 41%, which, according to the Task Force Report, was projected to be the enrollment once the Jefferson Cluster was implemented. However, the percentage of black students at West Tampa is currently approximately 48% (T1-113)

Under the Court's 1971 Order:

> (a) The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.

> *5 (b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

The Consent Order into which the parties entered in October 1991 ordered that any modifications in student assignment patterns resulting from demographic or other changes must be made with an eye toward "minimiz[ing] (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios ." Consent Order, p. 6.

A. *The 1971 Order*

Plaintiffs contend that the 1971 Order requires Defendants to prevent and/or remedy the reoccurrence of "racially identifiable" schools.

Approximately sixteen (16) of the public schools in Hillsborough County fall into the category of racially identifiable schools, according to Plaintiffs and their consultant, Dr. Stevens, and the definition they use (40% or more black students).

While not denying the statistical evidence cited by Plaintiffs, Defendants disagree with Plaintiffs' definition of a racially identifiable school as a school having a population of black students of forty-percent (40%) or more. Defendants also maintain that the 1971 Order required the desegregation of all schools and that such desegregation had occurred as of

December, 1971.[10]

Racial Enrollments Generally

Plaintiffs do not dispute that Defendants initially complied with the 1971 Order in desegregating the public schools of Hillsborough County.

In *Harris v. Crenshaw County Bd. of Educ.*, 968 F.2d 1090, 1095 (11th Cir.1992), the Eleventh Circuit reiterated the obligation of a school board operating under a desegregation order:

> Until a school system achieves unitary status, it has an affirmative duty to eliminate the effects of its prior unconstitutional conduct. To fulfill this duty, school officials are obligated not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system.

Id. at 1094-95 (footnotes omitted). Also, "[i]f a school system's violation of its duty to desegregate has been the cause of a racial imbalance in student attendance, then the condition must be remedied". *Id.* at 1096, *citing Freeman v. Pitts*, 503 U.S. 467 (1992).

---

[10]The response to the amended motion to enforce incorrectly asserts that this Court has "cleansed" the School Board of the "mortal sin of de jure discrimination based on race." (doc. 606, p. 10) However, this statement is not reflective of defendants' testimony at the hearing and the error appears to be counsel's.

However, the "constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971).

In *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 434 (1976), the defendants sought, *inter alia,* to eliminate the Court-mandated "no majority of any minority" requirement, i.e., no school in the district could have a majority enrollment of any minority group. The district court denied the defendants' motion in that regard, and the Ninth Circuit affirmed. The Supreme Court reversed, finding that the district court erred in interpreting its order to ***6** contemplate the 'substantive constitutional right [to a] particular degree of racial balancing or mixing' which the Court in [*Swann v. Board of Education*, 401 U.S. 1 (1970)] expressly disapproved. (Citation omitted). It became apparent, at least by the time of the 1974 hearing, that the District Court viewed this portion of its order not merely as a "starting point in the process of shaping a remedy," which *Swann* indicated would be appropriate, (citation omitted), but instead as an "inflexible requirement," (citation omitted), to be applied anew each year to the school population within the attendance zone of each school.

Although acknowledging that "[i]t may well be that petitioners have not yet totally achieved the unitary system contemplated by . . . *Swann,*" the Supreme Court continued:

> But that does not undercut the force of the principle underlying . . . *Swann.* In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the

> [Pasadena Unified School System] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Spangler, 427 U.S. at 436-37.

The Supreme Court's concern in *Spangler* was the inflexibility of the "no majority of any minority" requirement. Based on *Spangler,* it is clear that Defendants have no continuing duty to maintain a particular black-white ratio on a school-by-school basis, year in and year out, including the 80%/20% ideal set forth in the 1971 Order.

Plaintiffs' argument that the Defendants have an ongoing duty to redesegregate schools in which minority enrollment approaches 50% essentially seeks to impose a "no majority of any minority" rule in this case. As shown above, such a rule cannot be enforced.

Furthermore, the 1971 Order did not impose such a mandate on Defendants. In formulating their desegregation plan, Defendants were ordered to follow certain guidelines, including:

> The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county *now* having a school population at least 50% black.

> (b) In preparing the plan the school board *shall begin* with the proposition that [the 80/20 ratio] would be the most acceptable and desirable form of desegregation.

1971 Order, pp. 43-44 (emphasis added).

On July 2, 1971, the Court found that the plan submitted by Defendants "fully complies with the Court's Order of May 11, 1971, and the law and will result in the establishment of a unitary school system in Hillsborough County, Florida." Order, p. 9. The highlighted language does not support Plaintiffs' reading of the 1971 Order as imposing an ongoing duty to maintain a particular racial balance once Defendants have effected compliance with its terms. Neither the literal terms of the 1971 Order nor Supreme Court precedent justifies this view.

*7 As noted subsequently, Defendants have implemented changes in the desegregation plan, with the approval of plaintiffs and this Court, as a result of the Task Force Plan recommending the single-grade centers with middle schools and organizing all schools into geographic clusters. In this phase, which commenced in 1991, Defendants contend that they endeavored to bring as many schools as possible in line with the 80/20 ratio.

Thus, while Defendants have not been mandated to maintain a particular racial balance at each school, they have utilized the 80/20 ratio identified in the 1971 Order as a guide in formulating student attendance zones for district schools.

In summary, there is nothing in the 1971 desegregation order which requires the School Board to periodically adjust the racial enrollment at particular schools on an annual or less frequent basis once the initial goal of desegregation of student attendance patterns has been achieved.

The definition of a racially identifiable school

The parties also dispute what measure determines whether a school is "racially identifiable".

Plaintiffs point out that this Court has stated that "[a] school with a majority black population would undoubtedly be identifiable as a black school. The racial identification of schools is the antithesis of a unitary school system." *Mannings v. School Board of Hillsborough County, Florida*, 151 F.R.D. 133, 136 (M.D. Fla.1993). That published decision concerned a motion to intervene by persons objecting to the middle school Task Force Report. In the course of addressing the proposed intervenors' objections that black students cannot maintain a majority of the school population in black communities, the Court made the above-quoted statement.

Defendants argue that the precise definition of a racially identifiable school was not at issue in the motion to intervene and the Court's pronouncement was dicta. Moreover, Defendants argue that inquiry into racial identifiability of its schools is premature at this point because the Court has not yet been asked to determine whether the Hillsborough County public school system has attained unitary status.

The current issue before the Court as to the 1971 Order is whether defendants have an ongoing duty to maintain a particular racial balance at each school since 1972. The clear answer to that is "no".

The determination of whether a school system has attained unitary status involves consideration of a number of factors, including the administration, student assignment, personnel, extracurricular activities and resource allocation for each school, as well as the districting of the entire school system, and whether the school system is proceeding to

desegregate its schools in good faith. *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430, 436 (1968). The ultimate goal is a school system with schools that are racially nonidentifiable, i.e. not white schools and black schools, but rather just schools. *Id.* at 441.

***8** In *Freeman,* the Court observed that "as in most cases, where the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the race in the district as a whole." *Freeman*, 112 S. Ct. at 1437. *Freeman* held that a determination of unitary status can be made incrementally before full compliance has been achieved in every area of school operations. *Id.* at 1445.

While the instant litigation does not involve a determination of unitary status, this Court may wish to determine what percentage of minority or majority race students shall be used to define racially identifiable schools in Hillsborough County.

In doing so, this Court does not write on a blank slate. As noted, a definition of majority-black students was suggested in the 1993 *Mannings* order denying the motion to intervene. 151 F.R.D. at 136. However, the definition of racial identifiability was not directly at issue in that motion.

The May 11, 1971 Order finding that the Hillsborough County school system remained racially segregated referred to "a white school" as "a school that is attended by white students only, or whose student body is at least 95% white" and a "black school" as "a school with a student population that is all black or at least 90% black." May 11, 1971 Order, p. 11, n. 13. Nevertheless, the Court (the Honorable Ben Krentzman)

ordered defendants to immediately desegregate "all schools in their school system where at least half the students are black." May 11, 1971 Order, p. 39, 43)

Plaintiffs' consultant, Dr. Stevens, defines a racially identifiable school as one which has 40% or more black students because "once you get schools that are running 20 points or more at variance from the district-wide average, racial identifiability is a fact of life and becomes a reality for that school." (T2- 110) He states that one-third of all black elementary students in Hillsborough County are attending schools which are more than 40% black. (T2-218)

The courts have wrestled with the definition of what constitutes a racially identifiable school. *See e.g. Morgan v. Nucci*, 831 F.2d 313, 320 (1st Cir.1987) (declining to consider whether 80% or 90% minority enrollment makes a school racially identifiable while stating that 75% was too low a figure for Boston schools); *see also Riddick by Riddick v. School Board of City of Norfolk*, 784 F.2d 521, 533 (4th Cir.) (a racially identifiable school has fewer than 30% or more than 70% minority or non-minority students), *cert. denied*, 479 U.S. 938 (1986); *Yarborough v. Hulbert-West Memphis School District No. 4*, 457 F.2d 333, 334 (8th Cir.1972) (no fewer than 30% of the minority race at each school); *Diaz v. San Jose Unified School District*, 633 F. Supp. 808, 813 (N.D.Cal.1989) (a desegregated school is one with at least 20% majority and at least 20% minority students; noting expert testimony that "an ethnic group would risk continued isolation if it did not represent at least 20% of the student body at a given school"), *aff'd* 861 F.2d 591 (9th Cir.1988).[11]

---

[11]One Eleventh Circuit opinion which was subsequently vacated stated in a footnote that a school which was 64% black was clearly not racially identifiable while a school which would be 94%

*9 Some courts have focused on the extent to which black student enrollments vary from district-wide enrollment ratios. *See Little Rock School District v. Pulaski County Special School Dist. No. 1*, 839 F.2d 1296, 1307 (8th Cir.1988) (a racially identifiable black elementary school is one having a black student enrollment in excess of the applicable range of variance from the system-wide percentage of black students, *citing Penick v. Columbus Board of Education*, 583 F.2d 787, 799 (6th Cir.1978), *aff'd* 443 U.S. 449 (1979)); *Stell v. Board of Pub. Educ. for Savannah*, 860 F. Supp. 1563, 1574-80 (S.D. Ga.1994) (aim of desegregation order was to bring all schools, to the extent practicable, within +/-20 percent of district-wide ratio).

The *Stell* decision supports the approach suggested by plaintiffs' expert, Dr. Stevens. However, his definition of a racially identifiable black school as one having 40% or more black students (20 basis points above the district-wide norm) is a standard which has never been articulated or adopted by this Court. Even if Dr. Stevens' definition is used, 43% instead of 40% would be arguably be the correct measure for elementary schools whose black student population is approximately 23% at present.

Defendants have not proposed a definition of a racially identifiable school although Dr. John Miliziano, the Superintendent's Administrative Assistant, testified that he considers a school with more than 50% black students or

---

black clearly would be. *Lee v. Macon County Bd. of Educ.*, 970 F.2d 767,774 n.23 (11th Cir.1992), *vacated*, 987 F.2d 1521 (11th Cir.1993).

students of one race to be identifiable by race. (T2-146)[12] Dr. Miliziano has worked for the School Board for a number of years and one of his chief responsibilities since becoming Administrative Assistant has been to monitor and work with the desegregation plan, in particular the cluster plan. (T2-44)

Neither plaintiffs nor their consultant have raised any objection to racial enrollments at schools where the percentage of black students is significantly lower than the district-wide ratio. Rather, they ask Defendants to take remedial action as to those schools which plaintiffs contend are racially identifiable as black schools.

In their amended motion to enforce, plaintiffs have identified eight schools with 50% or more black enrollment[13] and eight with 40% to 50% black enrollment.[14] This information is from the 1993 Annual Report which Defendants filed with the Court. (doc. 601, p. 2)

If this Court adopts the definition suggested in the 1993 *Mannings* order, then all schools in Hillsborough County

---

[12]Plaintiffs point out that another School Board official, Kenneth Allen, Director of Pupil Administrative Services, testified that he does not have a working definition of a racially identifiable school but has operated under the assumption that "if there are students of mixed race at school, that is a desegregated school." (T1-234). Mr. Allen's responsibilities include formulating attendance boundaries for the schools contained within each cluster. (T1-222).

[13]Those schools are: Robles (90%), Edison (74%), Sulphur Springs (70%), Oak Park (66%), Graham (63%), Cleveland (59%), Foster (57%), Witter (56%), and Van Buren (50%).

[14]Clair Mel (48%), Shaw (48%), Cahoon (47%), Dowdell (46%), Sligh (43%), West Tampa (41%), and DeSoto (40%).

having black student populations of more than 50% shall qualify as racially identifiable schools. Approximately eight schools fit this definition. West Tampa is not one of those although it does fit Dr. Stevens' definition of a racially identifiable school because its black student enrollment is more than 40%.

Official Policy and Student Attendance Zones

A racial imbalance in student attendance zones is not tantamount to a showing that a school district is in noncompliance with the decree or its duties under the law. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. *Freeman*, 112 S. Ct. at 1446. (citations omitted).

***10** If the unlawful *de jure* policy of a school system has been the cause of the racial imbalance in student attendance, that condition must be remedied. The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation. *Id.* at 1447.

Due to the parties' disagreement over the meaning and scope of the 1971 Order, Defendants were not required to prove at the evidentiary hearing that the increased black enrollments at the sixteen schools identified by plaintiffs were due to demographic changes. However, such a showing is arguably unnecessary in the absence of some official school board action which could have created the racial imbalance.

Defendants agree that whenever the School Board takes action such as constructing new schools, closing old or unneeded schools, or changing attendance boundaries to accommodate educational needs, it must consider the racial mix resulting from the new or altered attendance patterns and refrain

from any action which would lead to the reestablishment of a segregated system.

Defendants deny that they have an obligation to compensate for a particular student enrollment ratio at a school absent any School Board action directly altering the attendance zone of the school in question.[15]

The stipulated facts indicate that Defendants have initiated boundary changes only for the purpose of relieving overcrowding or populating new schools, and have never altered attendance zones or created satellites solely to alter the racial enrollment ratio at a school, including those with a majority black enrollment. Nor has the School Board ever created a new school or changed boundaries to create a school that was over 50% black. (T2-146)[16]

Plaintiffs contend that Defendants have taken a continuous series of district-wide School Board actions (such as attendance zone modifications, new construction, addition of portable classrooms and use of special assignments) that have affected the racial enrollments of schools.

The Special Assignment Policy

---

[15]Defendants argue that they understood the 1971 Order to mean that they need not compensate for any changes in enrollment ratios not caused by a boundary change and attempted to introduce evidence at the hearing of alleged *ex parte* communications to this effect between the District Judge formerly presiding over this case and a former school board employee. This evidence was ruled inadmissible.

[16]The School Board uses the term attendance zones and boundaries interchangeably. (T2-150)

At the evidentiary hearing on the motion to enforce the only School Board action specifically addressed by Plaintiffs was the student special assignment policy established in the 1971 Order. This Court has not altered Defendants' obligations under this policy since that time.

The Court's 1971 Order prohibits the School Board from granting transfers except in six situations: (1) a voluntary transfer from any school in which the student is a member of the majority race of the student population to the closest school to the student's residence in which the student is in a minority; (2) a recommendation by the juvenile court; (3) the needs of exceptional children, as that term is defined by state law; (4) to allow the children of Defendants' faculties and staff to attend school where one of their parents worked; (5) to attend vocational school; and (6) severe hardship.

The 1971 Order also directed that special assignments were to be made "without regard to race, except that special attention will be given to ensure that transfers are not approved which are made for the purpose of avoiding desegregation." 1971 Order, p. 2. The Court also appointed a Bi-Racial Advisory Committee to act as an advisor to the School Board regarding transfers, school zones, and future site locations among other areas.

***11** The Bi-Racial Committee considers all transfer requests except for those from juvenile courts. In the case of transfers under grounds (3), (5), and (6), the School Board may approve such transfers only after considering recommendations by the Bi-Racial Committee. Transfer requests made under grounds (1) and (4) were to be reported to the Bi-Racial Committee by the Board.

Data on how the special assignments affect the racial balances at each school is collected by the School Board on an

annual basis. (T2-70-71) The Fourth Annual Report, filed on April 10, 1995 (doc. 695) contains the most current statistics for each school in Hillsborough County concerning special assignments. This Report was submitted after the evidentiary hearing on plaintiffs' amended to enforce and has therefore not addressed to any extent by the parties in their submissions. This data is not subdivided by the category of the transfer request, e.g. severe hardship, exceptional children needs, etc. (Fourth Annual Report, p. 97-100) For some unknown reason, the Third Annual Report does not include this data on special assignments.[17]

Plaintiffs' argument that the School Board must deny special assignment requests from students whose race constitutes more than 40% of the enrollment of the school they wish to attend (or whatever percentage this Court finds makes a school racially identifiable) is directly contrary to the Court's direction that requests for transfers must be considered without regard to race (except for transfers made for the purpose of avoiding desegregation).

Even Dr. Stevens did not classify the School Board's long-standing interpretation of the policy (to grant hardship special assignment requests without regard to race) as a violation of the 1971 Order; he felt that the Court should "revisit" the issue because that interpretation was counterproductive to desegregation. (T1-190)

---

[17]Although the Third Annual Report filed in April 1994 contains a similar section, no data is included for special assignments in the copy of the report filed with the Court; rather duplicates of a report on students transported for desegregation purposes is included. (Third Annual Report, p. 105-114)

At the hearing, the only special assignment requests addressed by plaintiffs were those made by parents of black children who wanted their children to remain at West Tampa Elementary because of neighborhood child care facilities. Plaintiffs do not contend that these requests were made by these parents for the purpose of avoiding segregation, but state that Defendants must deny such special assignment requests from black parents if necessary to maintain a certain race ratio, e.g. to keep the black enrollment at West Tampa below 40%, irrespective of the hardship which would be caused by denial of those requests.

Under the current policy, Defendants are prohibited from considering race in deciding special assignment requests; Plaintiffs have not shown that Defendants have violated any provision of the Court's 1971 Order regarding special assignments.

Based on the present record, it does not seem advisable for this Court to modify the special assignment policy to require denial of hardship requests if necessary to maintain a particular race ratio at a school. It is a fact of life that many parents must rely on after-school care for their children, and there is no denying that failure to accomodate such requests would lead to severe hardship in many cases.

*12 Based upon the data provided in the Fourth Annual Report, it is clear that the special assignment requests as a whole do not have a significant impact on racial enrollments on the eight majority-black schools identified in plaintiff's amended to enforce. All of these schools, with one exception would still be majority-black schools, even without the special assignments. That exception is Van Buren, the only junior high school among these eight schools, which has a 52/48 ratio and would have a 50/50 ratio without the special assignments. Of the other seven majority-black schools, the increase in black

enrollments caused by special assignments ranged from 1% (Oak Park and Whitter) to 7% (Robles).

Accordingly, Plaintiffs have not established that Defendants have taken official action with respect to the special assignments policy, with the intent to return to a dual school system or hinder desegregation.

Plaintiffs' Prior Actions and Representations

Even if such an affirmative duty to prevent racially identifiable schools existed once initial compliance with the desegregation order was achieved (even in the absence of any official school board policy), this Court should not ignore Plaintiffs' silence on this very issue.

It is undisputed that by the end of 1971 Defendants had desegregated all Hillsborough County schools, and there were no schools having a majority black student population and only one which was at 40-41%, Lee Elementary. (T2-53-54). In subsequent years, the percentage of black students increased at some schools.

Plaintiffs have been served with copies of the Annual Reports each year since entry of the 1971 desegregation order and the statistics in the Annual Reports indicated the racial enrollments at each Hillsborough County school, including those which greatly exceeded the 20/80 ratio recommended by the Court.[18] Yet, between 1975 and 1994, a period of almost

---

[18]Defendants' Proposed Findings of Fact and Conclusions of Law (doc. 689, p. 6-9) summarize the pertinent information in the Annual Reports with respect to schools which had black student populations of 40% or more. Copies of the Annual Reports were also introduced as exhibits at the evidentiary hearing. Defendants do not

twenty years, Plaintiffs filed no objection nor otherwise complained to the Court about the existence of "racially identifiable schools," even though such schools had existed within the system (according to plaintiffs' definition) almost continuously since 1971.

Moreover, in late 1990, Defendants sought permission from the Court to establish a magnet school at Hillsborough High School. Plaintiffs objected to this proposal and stated in a written response filed with this court that "the schools in Hillsborough County are desegregated under the existing decrees and the plan they incorporate."

That eight Hillsborough County schools have become majority (more than 50% black) since 1971 does not demonstrate that Defendants have violated this Court's 1971 Order or have failed in their affirmative obligation to eliminate the effects of the School Board's prior discriminatory and unconstitutional conduct.[19] Focusing on the school district as a whole, the number of majority-black schools is only about five percent of the schools within the district or ten percent if plaintiffs' measure of racial identifiability (more than 40% black) is used.[20]

---

dispute the accuracy of this information or their counsels' awareness of it.

[19]If this Court concludes that Defendants have the burden of establishing that the racial imbalance at these schools is not the result of prior *de jure* conduct, then the parties are entitled to an evidentiary hearing on this issue. By prior stipulation, that issue was not addressed at the hearings held thus far on plaintiffs' amended motion to enforce.

[20]Defendants presented testimony that 14 of the 16 schools identified by plaintiffs as racially identifiable schools actually attract

***13** Lastly, Plaintiffs' lack of objection to student attendance patterns in Defendants' Annual Reports prior to 1994 cannot be excused on the basis that the affirmative obligation to eradicate the effects of the prior de jure segregation lies solely with Defendants. Plaintiffs have been and continue to be active participants in this case since its inception.

Having entered a comprehensive order to desegregate the public schools of Hillsborough County, this Court has relied on both Plaintiffs and Defendants to monitor compliance with the desegregation order.[21] The position which Plaintiffs assert in the amended motion to enforce is inconsistent with plaintiffs' prior representations to this Court that the public school system was desegregated and plaintiffs' failure to object when these eight schools crossed the 50% threshold a number of years ago and became majority black schools. As discussed subsequently, plaintiffs also did not voice a similar objection when provided an opportunity to review and comment on the Task Force Plan adopted by this Court in its 1991 Consent Order.

Plaintiffs have not shown that Defendants are in violation of this Court's 1971 Order.

B. *The 1991 Consent Order*

Background

---

a great deal more financial assistance as "Chapter 1" schools than other Hillsborough County schools. (T2-88-90)

[21]Defendants also point out that plaintiffs' current claim for attorney fees includes fees for "monitoring" the annual reports, among other things and that one of plaintiffs' attorneys testified that for each of the seventeen years, he "had to do the work necessary to determine whether the installment of the School Board's plan for the next succeeding year . . . moved forward, marked time, or moved backward." (doc. 689 p. 9 n. 2).

Under the plan in existence prior to the Court's 1991 Consent Order, single grade centers (consisting of sixth or seventh grade) bridged the transition from elementary school to junior high school. The single grade centers were created under the original desegregation plan.

Implementation of the middle school concept involved creating attendance "clusters" which grouped elementary and middle schools around the high school which those students would ultimately attend. One of the major objectives of the cluster plan was to have neighborhood schools while maintaining a desegregated school system, among other goals. (T2-80; Task Force Report, p. 10-11)

The cluster plan reduced cross-busing for students in the inner-city as well as the suburbs and utilized intra-cluster busing and magnet school busing as additional alternatives for desegregating the school system. (Task Force Report, p. 14).

The school district held extensive public meetings and hearings on the middle school plan which addressed, among other things, proposed attendance boundaries for the clusters. As a result of these meetings, as well as discussions with plaintiffs and their representatives, changes were made. For example, West Tampa parents at one hearing wanted West Tampa to be included in the Jefferson Cluster instead of the Plant Cluster and the school board agreed to that modification. (T2-60-68).

The middle school concept affected all schools within Hillsborough County, not simply the grades 5 through 9, because it created attendance clusters which did not exist previously. Thus, the Court recognized that implementation of the middle school grade structure necessarily required "modification of the Court's Orders in this action." Consent Order, p. 1.

***14** Designing the clusters required altering the attendance zones for some schools because there was not a perfect geographic fit for all the clusters. Ideally, each high school boundary would have included the necessary number of middle schools and elementary schools needed for each cluster. However, this was not the case with every school. When boundaries had to be changed, the School Board staff considered factors such as distances, enrollments, capacity and also the impact of the boundary change on racial enrollments. Whenever possible, staff tried to bring all the schools closer to the 20/80 ratio. (T2- 97-101) The School Board's desegregation monitor, Dr. Miliziano, terms the 16 schools at issue in plaintiffs' motion as "anomalies". (T2-101-102)

Disputed Issues of Interpretation

Plaintiffs contend that the 1991 Consent Order did not modify any provisions of the 1971 Order which were not explicitly addressed and required that there not be any schools where the percentage of black students exceeded 40%.

This position is contrary to the parties' conduct at the time the Task Force Report was under consideration. Dr. Stevens was retained as an educational expert by Plaintiffs to specifically review the middle school plan and determine whether it was consonant with the objectives of desegregation and to determine whether it imposed an unfair burden on the plaintiff class of pupils. (T1-98). There were several meetings and discussions between plaintiffs and defendants concerning various aspects of the proposal.

One concern of plaintiffs was that inner-city predominately black children were not assigned to a single cluster. As a result, an additional cluster was added to the plan for a downtown high school. (T2-65-66). There were certain other items that plaintiffs were adamant about including in the

middle school plan, including retaining one elementary school (Lockhart) in the inner city that was not a magnet school. (T2-77-79). Defendants incorporated this request into the plan. (T2-80). Plaintiffs also argued for a 40/60 instead of 20/80 black/white ratio for magnet schools and this request was also incorporated into the plan. (T2-83-85)

At no time during the negotiations over the middle school plan did Dr. Stevens or counsel for plaintiffs raise a concern about the projected attendance patterns reflected for any of the sixteen schools which are identified as racially identifiable schools, including the eight majority black schools, in plaintiffs' amended motion to enforce. (T2-82-83).[22] Nor did plaintiffs argue, as they do now, that defendants needed to adjust the racial balance at these schools to insure that black student enrollments did not exceed 40%.

The 1991 Consent Order states, in pertinent part:

> The report to be filed annually by April 15 shall also include a description of changes in facility utilization, student attendance, grade structure, or curriculum, etc. that are proposed to be implemented in the succeeding school year, and sufficient information relating to such

---

[22]Five of the eight schools identified in plaintiff's motion were projected to have majority-black students under the cluster plan: Robles (76%), Edison (64%), Sulphur Springs (59%), Oak Park (58%), and Graham (58%). The others were: Cleveland (50%), Foster (39%), and Van Buren (27%) Seven of these schools are elementary schools; Van Buren is a junior high school. Also, two of the eight schools are each assigned to different clusters. Cleveland and Sulphur Springs are both in the Chamberlain Cluster; Whitter and Van Buren are both in the Northeast Tampa SHS Cluster; and Graham and Foster are both in the Hillsborough Cluster. (Task Force Report, p. 48-102)

> changes to permit the Court to determine their impact upon the maintenance of desegregated schools in Hillsborough County and the elimination of any lingering vestiges of prior discrimination from the school system. *The Court recognizes and anticipates that there will be modifications each year of the projected student assignment patterns contained in Appendix I to the Task Force Report to take account of demographic or other changes that occur. In making such modifications, the school district should seek to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14).*

***15** Consent Order at 5-6 (emphasis added).

The pertinent section of the Task Force Report cited above is:

> The number of schools reflecting a ten or higher percent race ratio variance will increase from 36 to 46. The plan also increases the number of schools from 56 to 72 that will have an almost perfectly balanced race ratio with a student variance of five percent or less from the recommended 20/80% ratio.

With respect to the portion of the 1991 Consent Order highlighted above, Plaintiffs state that Defendants have a duty to minimize deviation from the race ratios (specified in the 1971 Order), any time new attendance zones under the cluster plan are implemented.

Defendants contend that the duty is triggered only when the zones are implemented in a manner that deviates from (modifies) the zones proposed in the Task Force Report. However, Defendants state that the duty is not triggered even as

to the Jefferson Cluster because it is being implemented in "relevant respects" as it was projected in the Task Force Report.

The Joint Pre-Evidentiary Hearing Statement (doc. 657) sets out the parties' respective positions.

As the Court knows, the 1991 Consent Order was entered pursuant to the stipulation of the parties. At the evidentiary hearing, plaintiffs' attorneys acknowledged that they drafted the Consent Order. (T1-63)

The Consent Order clearly provides that in making *modifications* to the projected student attendance patterns, the school district should seek to minimize, to the extent practicable, the number of schools which deviate from the system-wide student enrollment ratios. This interpretation, which has been followed by Defendants, is supported by the plain language of the underlined portion of the Consent Order read in context with the prior sentence.

Plaintiffs contend that each time a cluster is implemented, Defendants have a duty, as to each school in the cluster, to minimize the extent of any deviations from the system-wide ratios to the extent practicable regardless of whether any modifications are proposed which differ from the cluster plan approved by the Court in 1991.

This position is not only contrary to the language of the Consent Order which plaintiffs drafted, but it also overlooks the substantial planning which went into the Task Force Report approved by the court. The student attendance zones were mapped out for each cluster with street boundaries provided in nearly every case, including satellite zones. (Task Force Report, p. 40, 43, 46, 49-50, 53-56, 59-61, 64-65, 68, 71-72, 75-76, 79-80, 83-86, 89-90, 93, 96-97, 100, 103-104).

The cluster plan and proposed attendance zones received extensive public hearings before being finalized and approved by the school district. Plaintiffs were involved in this process. Plaintiffs were also provided a copy of the final Task Force Report and had ample time (more than two months) to present suggestions or objections concerning the student attendance zones proposed for each cluster. Plaintiffs, through Dr. Stevens, had some concerns and made a number of suggestions which were implemented by the school district. (T1-99- 102) However, it is undisputed that none of these suggestions involved altering the student attendance zones for those schools which were projected to have black student enrollments of 40% or more, the very situation addressed in plaintiffs' instant motion. (T1-140; T2-103)

***16** One of the objectives of the Task Force Plan was minimizing the number of racially identifiable schools and racial disparity in transportation of students. (T2-93) In accomplishing this goal, school board officials proceeded on the assumption that it was better to bring more schools in line with the district-wide racial enrollment even if that meant that the racial imbalance might increase at certain schools.

This approach certainly had plaintiffs' implicit, if not express, endorsement because the Task Force Plan was incorporated into the Consent Order which the parties submitted to this Court.

Thus, the Task Force Report stated that under the plan, the "number of schools reflecting a ten or higher percent race ratio variance will increase from 36 to 46" while the plan "also increases the number of schools from 56 to 72 that will have an almost perfectly balanced race ratio with a student variance of five percent or less from the recommended 20/80% ratio." (Task Force Report, p. 14).

On the next issue of the interpretation of the Consent Order, defendants' argument--that there may be *de minimis* modifications to the cluster plan which do not require consideration of the effect on race ratios--is not supported by the language of the order. Thus, the modifications to the Jefferson Cluster proposed in 1993 required Defendants to consider the effect of the modifications on the student attendance patterns under certain circumstances.

The Court must next resolve the parties' disagreement over the nature and scope of Defendants' obligations. Defendants are directed that "[i]n making such modifications, the school district should seek to minimize (to the extent practicable) the *number of schools* which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14)." Consent Order at 5-6 (emphasis added).

Plaintiffs argue that such language is to be read as requiring the School Board to minimize the extent to which any school deviates from the system-wide ratio, even if that action would increase the extent of the deviation of another school in the cluster, so long as neither school becomes "racially identifiable". Defendants contend that they are only required to take actions that minimize the number of schools which deviate from the system-wide ratio. Alternatively, Defendants contend that even if the language is read as speaking to the magnitude of the deviation, it does not require reduction of deviation at one school if an increase in the extent of deviation from the system-wide ratio would result at another school.

Plaintiffs' interpretation is once again contrary to the clear language of the provision which they drafted. Moreover, because a consent order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). Therefore,

even if the language were ambiguous, the Court, in applying well-established rules of construction, would construe the ambiguity against Plaintiffs as the drafters of the proposed Consent Order.

*17 Thus, Defendants' duty under the 1991 Consent Order as to attendance zone modifications is to minimize the number of schools that deviate from the 20/80% race ratios, not the extent to which the schools deviate. Plaintiffs not only agreed to this, but drafted the Consent Order this way.

In fact, prior to the parties' disagreement over implementation of the Jefferson Cluster, Dr. Stevens met with School Board representatives concerning a staff proposal to modify another middle school cluster, the East Bay Cluster.

Defendants proposed to convert one of the new elementary schools, B.L. Bing, to a middle school instead of Progress Village due to the extremely high construction bids for converting Progress Village to a middle school. Dr. Stevens objected to the plan because it would result in more schools deviating from the 20/80 ratio than agreed upon in the Task Force Report. Because of this opposition, the School Board decided not to seek court approval for the modification which would have resulted in a savings of approximately six or seven million dollars in construction costs. (T2-142-145).

This testimony is significant because it demonstrates that plaintiffs' current interpretation of the "duty to minimize" language in the 1991 Consent Order is of recent vintage and is contrary to the parties' prior dealings in discussing proposed modifications to the Task Force Plan.

There is no evidence that the modifications to the Jefferson Cluster Plan proposed for the 1994-1995 school year increased the number of schools within the cluster which

deviated from the district-wide 20/80 norm set out in the 1971 Order and adopted by reference in the 1991 Consent Order.

West Tampa Elementary

Even if plaintiffs' interpretation of the minimization duty is correct, there is no "practicable" method to reduce the black enrollment percentage at West Tampa Elementary School.

Because the Jefferson Cluster was implemented sooner than projected, there was no middle school ready for all of the sixth-graders. Defendants proposed to retain some of the sixth-graders--those who walked to school--at West Tampa while sending those who the 1994 school year until the middle school that the students were assigned to was ready. Those students who walked to school were mostly black and those who were bused were mostly white. (T1-75; 182-183).

The main reason for the increased number of black students at West Tampa since projected in 1991 is the special assignments granted parents who have after- school care arrangements for their children nearby. Many of the West Tampa parents work and utilize the boys' and girls' club within the attendance area. (T2-128)

Plaintiffs' consultant, Dr. Stevens, conceded that without these special assignments, the black student population at West Tampa would be about 41%. (T2-113) Dr. Stevens proposes denying special assignment requests, including those made on hardship grounds, if necessary to maintain black enrollments below 40%. As previously stated, this would violate this Court's 1971 Order directing that such requests be considered without regard to race unless made for the purpose of avoiding desegregation.

***18** Also, Dr. Stevens' plan to alter the attendance zones for West Tampa would involve a segment of students crossing a major four-lane highway (Columbus Drive) to walk to school, which would require transporting those students.[23] Even then, some students would elect to walk to school and crossing Columbus Drive would pose a significant hazard to them. In addition, a satellite which Dr. Stevens proposes to use is already assigned to another cluster. (T2-129-137; 172-175; 200).

For these reasons alone, plaintiffs' alternative to the temporary measure of leaving some sixth-graders at West Tampa is not practicable, even if the 1991 Consent Order did impose a duty to minimize the extent of deviation at that school from the system-wide ratio.

While Defendants have a constitutional obligation to render decisions that further desegregation, *see Harris*, 968 F.2d at 1094-95, "[i]t is the maximum practicable desegregation that the law requires." *Stell*, 860 F. Supp. at 1580 (citation omitted).

Plaintiffs have not shown that Defendants are in violation of the 1991 Consent Order. The Third Annual Report with the proposed modifications to the Jefferson Cluster should be approved.

Future Cluster Implementations Beyond 1995-1996

---

[23]The proposal which Dr. Stevens presented at the evidentiary hearing was not the same suggestion that he made when raising his concerns with Dr. Miliziano and other school board staff almost a year earlier prior to the filing of the Third Annual Report. (T1-196).

The eight schools addressed in plaintiffs' motion with black student enrollments over 50% are: Robles, Edison, Sulphur Springs, Oak Park, Graham, Cleveland, Foster, and Van Buren. All but the last three were projected to have black student enrollments over 50% when the Task Force Plan was adopted.[24]

The clusters these schools belong to have not been implemented yet by the School Board. Under the 1991 Consent Order Defendants' obligations to adjust the race ratios at these schools do not arise unless there are *modifications* to clusters to which these schools are assigned *and* those modifications *increase the number of schools* which deviate from the system-wide ratio.

The Third Annual Report submitted on April 15, 1994 indicates that the percentage of black students attending these schools is higher than projected in 1991, and significantly so in some cases. For example, Robles was projected to have 76% black students and had 90% black students in 1993. Edison (64%) had 74%. Sulphur Springs (59%) had 70%. Oak Park (58%) had 66%. Graham (58%) had 63%. Cleveland (50%) had 59%. Foster (39%) had 57%. Whitter (40%) had 56%, and Van Buren (27%) had 50%. The Fourth Annual Report submitted two months ago shows additional increases in the percentage of black students at these schools.

These statistics may persuade this Court that a prospective modification of the 1991 Consent Order is in order, particularly because it was acknowledged in the Task Force Report that planning beyond the 1995-1996 year "must be viewed as tentative because more information is needed to

---

[24] *See* footnote 22, *supra.*

make accurate predictions." 1991 Consent Order (citing Task Force Report, p. 26).

Although the motion to enforce should be denied because there have been no violations of the Court's orders, this Court may wish to consider whether, commencing with the 1996-1997 school year, it is reasonable to require Defendants, when implementing a particular cluster or clusters on an annual basis, to establish that as to any school within the particular cluster having majority-black student enrollments (or whatever measure this Court may identify) that the racial imbalance is the result of demographic or other factors other than official school board policy. If the Defendants are able to meet this burden, consistent with the *Freeman* decision, then the inquiry would end.[25] If Defendants were unable to meet this burden, then they would have to show that the schools in question have been desegregated to the maximum extent practicable.

***19** If the Court were inclined to consider such action, it would be best to impose on the parties the requirement of a good faith effort to resolve any disputed factual issues, including use of mediation. The Court may also wish to

---

[25]For example, Plaintiffs point to Robles as the paradigm of a racially identifiable school. While the statistics concerning racial enrollments are undisputed, Defendants point out that Robles has not had any boundary changes since 1971. Despite acknowledging this fact, plaintiffs' consultant, Dr. Stevens, was unwilling to agree that demographic changes in the residential area surrounding the school are responsible for the current racial enrollments. Dr. Stevens has not done any studies on the practicability of readjusting the student enrollment at that school (or any of the other schools identified in plaintiffs' motion) except for West Tampa. However, he suggested that "part of the solution may lie in an out-of cluster assignment" when it comes time to bring on line the cluster to which Robles is assigned. (T1-215-220).

consider appointing an outside expert to advise the Court on issues relating to Defendants' desegregation efforts. As a result of the amended motion to enforce, it may be that the parties' respective desegregation experts have become somewhat entrenched and proprietary in their positions.

At some point in time, the Court will have to determine whether the school system of Hillsborough County has achieved unitary status.[26] The issues the Court will be called on to decide at that time arguably may be more focused and easier to resolve if these measures are implemented.

However, it must be emphasized that the issues of modifying the 1991 Consent Order for future cluster implementations and appointing an independent monitor or desegregation expert were not addressed at the evidentiary hearing and are offered only as additional factors the Court may wish to consider.

III. CONCLUSION

For the foregoing reasons, I recommend that Plaintiffs' Amended Motion to Enforce Court Order and Consent Order and for Further Relief (doc. 601) be denied and the Third Annual Report filed by Defendants in 1994 be approved.

NOTICE TO PARTIES

Failure to file and serve written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date it is served on the parties shall bar an aggrieved party from a *de novo* determination by

---

[26]At closing argument, Defendants' counsel indicated that the a motion to determine unitary status had not been filed because the School Board had not made that request.

the District Court of issues covered in the report, and shall bar the party from attacking on appeal factual findings in the report accepted or adopted on appeal by the District Court except upon grounds of plain error or manifest injustice. 28 U.S.C. § 636(b)(1)(C); Local Rule 6.02; *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir.1982) (*en banc*).

Supreme Court, U.S.
FILED
JUL 13 2001
CLERK

No. 00-1871

In the
Supreme Court of the United States

Andrew L. Manning, *et al.*,
Petitioners,

v.

The School Board of Hillsborough County, Florida
(formerly Board of Public Instruction of
Hillsborough County, Florida), et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. CROSBY FEW
FEW & AYALA
109 N. BRUSH STREET
SUITE 201
TAMPA, FL 33602
(813) 229-6401

THOMAS M. GONZALEZ
Counsel of Record
THOMPSON, SIZEMORE &
GONZALEZ, P.A.
TAMPA, FL 33602
(813) 273-0050

Counsel for Respondents

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

218 pp

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), Respondent submits the following list of parties:*

1. The School Board of Hillsborough County, Florida (formerly known as the Board of Public Instruction of Hillsborough County, Florida), Respondent.

2. Joe E. Newsome, as Chairman of the School Board of Hillsborough County, Florida, Respondent.

3. Doris Ross Reddick, as Vice Chairman of the School Board of Hillsborough County, Florida, Respondent.

4. Glenn Barrington, as a Member of the School Board of Hillsborough County, Florida, Respondent.

5. Carolyn Bricklemyer, as a Member of the School Board of Hillsborough County, Florida, Respondent.

6. Carol W. Kurdell, as a Member of the School Board of Hillsborough County, Florida, Respondent.

7. Jack R. Lamb, Ed.D., as a Member of the School Board of Hillsborough County, Florida, Respondent.

8. Ann Olson, as a Member of the School Board of Hillsborough County, Florida, Respondent.

9. Earl J. Lennard, Ph.D., as the Superintendent of Schools for the School Board of Hillsborough County, Florida, Respondent.

10. The class of all African-American minor children who are eligible to attend the public schools of Hillsborough County, Florida, and their parents and/or next friends.

11. Andrew L. Manning, a minor, by his father and next friend, Willie Manning, Petitioner.

12. Shayron B. Reed, and Sandra E. Reed, minors, by their father and next friend, Sanders B. Reed, Petitioner.

13. Nathaniel Cannon, Norman Thomas Cannon, Tyrone and Darnel Cannon, minors, by their father and next friend, Nathaniel Cannon, Sr., Petitioners.

14. Gail Rene Myers, a minor, by her father and next friend, Randolph Myers, Petitioner.

* The individual Petitioners are listed here as they appeared in the caption of the original complaint filed in this case in 1958, at which time the then minor Petitioners, with their adult parents, were alleged to be adequate representatives of the class. The Petitioners have not included in their petition's List of Parties the next friends who were original parties to the complaint, and those Petitioners who were minors in 1958 obviously have reached majority. The Respondent is without knowledge as to what, if any, status any of the original Petitioners occupy in the current context of this proceeding, or the litigation from which it arises.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

TABLE OF AUTHORITIES iv

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI 1

STATEMENT OF THE CASE 1

ARGUMENT 12

I. The Decision of the Court of Appeals Does Not Conflict With This Court's Decisions or Those of Other Circuits and it Does Not Improperly Shift the Burden of Proof on Unitary Status Issues to Plaintiffs 12

II. The Court of Appeals' Interpretations of the Good-faith Standard Does Not Conflict With the Framework Established by his Court's Decisions in *Freeman* and *Dowell* with the Tenth Circuit's Interpretation 24

III. The Court of Appeals Did Not Misapply Governing Law in its Review of the District Court's Factual Findings 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

Brown v. Board of Education,
978 F.2d 585 (1992) 21, 22, 23

Board of Education v. Dowell, 498 U.S. 237 (1991) . . . 19

Dowell v. Board of Education
8 F.3d 1501 (10th Cir. 1994) 21, 23, 24

Freeman v. Pitts
503 U.S. 467 (1992) . . . . . *passim*

Jenkins v. Missouri, 122 F.3d 588 (8th Cir. 1997) 23

Keyes vs. School District No.1, Denver, Colorado
413 U.S. 189 (1973) 14, 17

Lockett v. Board of Education of Muscogee County
92 F.3d 1092 (11th Cir. 1996) (Lockett I) . . 12, 13

Lockett v. Board of Education of Muscogee County
111 F.3d 839 (11th Cir. 1997)
(Lockett II) 12, 13, 14, 16, 26, 27

Missouri v. Jenkins, 515 U.S. 70 (1995) 26

Swann v. Charlotte-Mecklenberg Board of Education,
402 U.S. 1 (1971) 2, 14, 20

Statutes and Rules

28 U.S.C. § 636 1

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, the School Board of Hillsborough County, Florida, *et al.* ("School Board"), respectfully ask the Court to deny the petition for writ of certiorari filed by Petitioners Andrew Manning, *et al.*, who seek review of the decision of the United States Court of Appeals for the Eleventh Circuit entered in this case on March 16, 2001. The holding for which review is sought is a narrow one, based on the specific and unique facts of this case. It does not conflict with any decision of this Court or any Court of Appeals. Neither does it decide an important federal question, nor present any other basis warranting review by this Court.

STATEMENT OF THE CASE

In the case before the Court, the Eleventh Circuit declared the public schools of Hillsborough County, Florida, to be unitary after nearly forty years of court supervision. It reversed the holding of the United States District Court for the Middle District of Florida, in which that Court found that the schools were not unitary and declined to restore local control over the school system. The District Court reached this determination after rejecting a contrary conclusion contained in the report and recommendation of the Magistrate Judge, to whom the District Court had committed the issue of unitary status for trial and recommendation pursuant to 28 U.S.C.§ 636(b)(1)(C).

"Proper resolution of any desegregation case turns on a careful assessment of its facts." *Freeman v. Pitts*, 503 U.S. 467, 474 (1992). Therefore, the factual and judicial contexts in which the Circuit and District Courts reached their decisions was essential to their decision-making, as it is to the

determination of this petition. Petitioners' statement of the case is inadequate for the last purpose. The statement is largely dependent on selectively taken portions of the Court of Appeals' and District Court's orders, which have been taken out of context and argumentatively presented. The statement therefore omits much that is relevant and material.

This case began in 1958 with the filing of the Petitioners' complaint, which sought judicial intervention to end Respondents' racially segregated dual system of public education and to allow African-American children to "attend schools nearer their places of residence." Resp. App. 1b-7b. On August 21, 1962, the District Court held that Respondents were in fact operating an unlawfully segregated school system and ordered them to file a comprehensive plan for desegregation. Pet. App. 191a.[1] Over the next nine years following that order, Respondents submitted many such plans and the District Court entered a number of orders, several of which were appealed. *Id.*

The effectiveness, or lack thereof, of the various plans which Respondents submitted and implemented in the period between 1962 and 1971, was described at length in the District Court's order of May 11, 1971. Resp. App. 8b- 77b. That order was entered by the District Court acting *sua sponte* only twenty-one days after this Court, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), described the wide breadth of a district court's powers, and its

---

[1]References to the appendix to the petition will be made by use of the symbol "Pet. App." and page number(s). References to the appendix to this brief will be made through use of the symbol "Resp. App." and page number(s). References to the petition itself will be made through use of the symbol "Pet." and page number(s).

obligation, to end and effectively remedy *de jure* racial segregation occurring in a public school system. Armed with that instruction, the District Court entered an order which began with a recitation of the history of Respondents' desegregation efforts, and made clear its dissatisfaction with the level of Respondents' commitment to desegregation as well as their lack of success in attaining it.

The District Court then focused its attention on what it referred to as "black schools," i.e., 15 of Respondents' schools having student populations which were all, or at least 90% African-Americans, and declared simply that "[Respondents] must desegregate all [such] schools." Resp. App. 24b, n.13, 64b-65b. Conceding that some of the segregation in Respondents' schools might be *de facto* rather than *de jure*, the District Court nevertheless concluded that "*all* of the predominantly black schools must be eliminated." Resp. App., 62b, n.48, emphasis added.

The District Court explained its concerns, and its intentions, noting in particular that:

> There is no evidence of any substantiality in the record supporting the position that segregation in Hillsborough County is attributable in any measurable degree to voluntary housing patterns or other factors unaffected by school board activity. As indicated earlier, the record makes plain that prior to and since 1954 certain schools in Hillsborough County have been set aside for black students and others for white students. With exceptions these schools remain racially identifiable. Over the years [Respondents] have submitted numerous plans for

> desegregation, not one of which has altered the naked fact that most blacks attend schools which are inordinately black whereas most whites attend schools in which there are no blacks or only minuscule numbers of blacks. The Court has been unable to locate a single instance where [Respondents] took positive steps to end desegregation at a black school and thereafter segregation returned fortuitously. Indeed, no serious attempt has ever been made to eliminate the many black schools. Based on experience, the court concludes that what resegregation there has been is a consequence of the continued existence of schools identifiable as white or black. Resp. App. 62b-63b.

To remedy this situation, the District Court ordered drastic and immediate action, intended to eliminate once and for all Respondents' ability to segregate students according to race, by doing away with *all* of the "black" schools which Respondents had used for that unlawful purpose, and, in addition, those schools at which African-Americans constituted at least 50% of the student population. The Court allowed Respondents only slightly more than thirty days in which to formulate a plan which was to be effective in the next school year, the start of which was then only four months away. Resp. App. 67b-68b. The plan was to have as its "primary objective" the "abolition of segregation in all schools in the county," and "in particular [those] now having a student population at least 50% black" (a requirement which involved 28 schools, including the 15 identified as "black" under the Court's 90% standard) *Id.*, 58b, n.45. In formulating the plan, Respondents were to:

> begin with the proposition that white black ratios of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation. Resp. App. 68b.

While it was left to Respondents to formulate the specifics of the desegregation plan, the District Court limited their discretion by specifying the particular desegregation tools which were to be used ("pairing, grouping, clustering, and use of satellite zones"), adding:

> In view of what has gone on before, any proposed desegregation by use of rezoning or gerrymandered zoning shall be supplemental, secondary, and alternative to desegregation by the techniques mentioned earlier . . . and shall not be in lieu thereof. Resp. App. 69b.

Respondents timely responded to the District Court's directive with a plan that would immediately eliminate *all* majority black schools. The plan was approved by the District Court on July 6, 1971. Resp. App. 78b-96b. Under the plan, which used only the tools favored by the District Court, the county's two "black" high schools would be closed and their entire student populations distributed in satellites among "white" high schools. Resp. App.82b-83b. All "black" junior high schools were closed and converted to seventh grade centers. African-American students formerly attending "black" junior high schools would attend seventh grade in one of these centers, with white students transported for that grade. For grades eight and nine, the African-American students, with a few exceptions, would be assigned in satellites to formerly "white" schools. All "black"

elementary schools would be closed and their buildings used for sixth grade centers, which would be attended by black and transported white students in that grade, and all black students would be distributed as satellites among "white" schools for the remaining elementary grades. Resp. App. 80b-81b.

In approving the plan, the District Court noted that although Petitioners "did not question the effectiveness of the plan in desegregating the school system," they did object to the fact that the elimination of "black" schools placed a disproportionate burden on black children, because no longer having the neighborhood schools which had been ordered closed, they would be transported in greater percentages than white children, who retained their schools. Resp. App. 84b-86b. The Court conceded the correctness of this assessment of relative burdens, but overruled Petitioners' objection, noting that:

> If each of the [majority black] elementary schools retained its character as grades one through six and each of the junior high schools retained its character as grades 7, 8, and 9, satellite zones would have to be utilized in order to bring whites into the formerly black schools. This would provide an invitation to either "white flight" or "black flight," or both. Resp. App. 84b-85b.

After rejecting Petitioners' objection, the District Court found that the plan submitted by Respondents "fully complies with the Court's [May 11, 1971] order . . . and the law and will result in the establishment of a unitary school system. . . ." Resp. App. 89b. In stark contrast to the criticism of Respondents contained in its May 1971 order, the District Court also wrote:

> The record reflects the procedure followed by [Respondents] in developing the plan. At hearing the Court commended [Respondents], their staff and attorneys for this procedure.... Without agreeing to the desirability of the Court's order [Respondents] followed it as being law. For the record the Court repeats its appreciation and commendation.
>
> As has been emphasized in previous orders, the school board has a continuing responsibility. [Respondents] represent that the plan can and will be effectuated. The Court will require that this be done. Resp. App. 89b-90b.

The plan was in fact fully implemented, at the beginning of the 1971-1972 school year. The result of that action, as the District Court found in its December 4, 1998, order denying unitary status, was that:

> In the 1971-1972 school year, [Respondents] *had* desegregated all Hillsborough County Schools, with regard to student assignment; no majority black school existed in the county. Pet. App. 62a, emphasis added.

There was no majority black school in operation in Hillsborough County in the 1971-1972 school year. No school in operation that year had ever been a "black" school, (although the buildings used for those schools now housed the single grade centers which would be attended by students of both races). Resp. App. 57b, n.44.

Additionally, at the District Court's direction, in the

year following implementation of the desegregation plan, and in each year thereafter, Respondents prepared two reports: one showing the racial compositions of student and staff populations at each county school, the other informing the District Court and Petitioners of any and all proposed changes to be made in the attendance zone of any school in the upcoming year, with the racial mix of students projected to result from that change. Each of these reports was filed with the District Court and served on Petitioners' counsel. *Id.* From 1971 until 1994, Petitioners did not file any objections to the existence of racially identifiable schools. Pet. App. 64a, 110a.

After reviewing the reports filed in late 1974 (the fourth school year of the plan's operation), the District Court issued on its own initiative an order noting that one of Respondents' 128 schools had become majority black, and four others had high percentage black student populations. Pet. App. 63a. The Court *sua sponte* directed Respondents to file a supplemental plan to address these situations. Pet. App. 63a. *Id.* That supplemental plan projected decreases in the percentages of black students at all of the schools in question. Those decreases did not occur at two of the schools. Pet. App. 64a. The District Court took no further action. At no time after the implementation of the supplemental plan, until the order of October 26, 1998, did the District Court find that Respondents had in any way failed to comply with their obligations under the desegregation plan, nor did the District Court order the formulation of any additional supplemental plan, nor the taking of any action addressed to the racial composition of students at any school. Pet. App. 64a.

In 1990, Respondents sought to establish a magnet program at Blake Junior High School, to reduce the percentage of African-American students attending it.

Petitioners objected, and the District Court therefore denied Respondents' request. To support of their objection, Petitioners, acting through the same counsel who represents them here, argued that:

> The basic structure of desegregation in [Respondents'] school system has remained constant and *effective* since 1971. Pet. App. 23a, n.21, emphasis added.

Petitioners also argued that the introduction of the proposed magnet school would "introduce more uncertainty about whether schools would *remain* desegregated." *Id.* emphasis added.

In 1991, the parties agreed to a conversion of Respondents' school system from a elementary-junior high-high school configuration to one based on elementary-middle-high schools "clustered" in geographic divisions of the county. Pet. App. 67a-69a. Under the proposal, the single grade centers which were in the original plan were to become magnet or middle schools. *Id.* The projected populations of each of the schools in these clusters, several of which included majority black schools, were agreed to by the parties and incorporated in the District Court's consent order. Resp. App. 100b-101b.

From the 1977-1978 school year to the time of hearing, Respondents made some 300 minor modifications in student assignments, for purposes other than racial balance. Pet. App. 65a. Each of these modifications was brought to the attention of the District Court and Petitioners prior to its implementation. None was rejected by the District Court. As noted in the Magistrate's first report and recommendation, Petitioners "filed no objection nor otherwise complained to

the [District] Court about the existence of 'racially identifiable schools' even though such schools had existed . . . almost continuously since 1971." Pet. App. 299a. The District Court, while rejecting the Magistrate's conclusion of unitary status, noted that Petitioners' failure to object to racial enrollments until 1994 "indicate[d] that there were no perceived violations of the 1971 Order." Pet. App. 125a.

In 1994, Petitioners filed an Amended Motion to Enforce Court Order and Consent Order and for Further Relief, in which they alleged for the first time that Respondents were violating the District Court's original desegregation plan and the consent order by operating schools with majority or near-majority African-American populations. Pet. App. 70a. In the motion, Petitioners pointed to sixteen specific schools with student populations in which African-Americans comprised at least 40% of the whole. Pet. App. 70a-71a. None of these schools had ever been a majority black school at any time prior to, or at the time of, the implementation of the 1971 plan. Each was predominantly "white" in 1971, and "immediately after the 1971 plan was implemented [became] racially balanced." *Id.*, Pet. App. 15a-16a.[2]

The District Court designated a Magistrate Judge to hear Petitioners' motion. The Magistrate Judge conducted bench a trial and on June 23, 1995, issued a report and recommendation in which she recommended denial of the motion "because there have been no violations of the Court's

---

[2]As the District Court specifically found, the number of Respondents' racially imbalanced schools is "relatively small." Pet. App. 130a. At the time that the motion to enforce was filed, Respondents operated 149 schools. Pet. App. 70a.

orders." Pet. App. 312a.

On November 17, 1995, the District Court deferred ruling on the report and recommendation, citing the need to make a "full fledged determination of whether [Respondents have] in fact achieved unitary status," but making no comment on the Magistrate's conclusion that there had been no violation of the Court's orders. Pet. App. 71a. The District Court referred the determination of unitary status to the same Magistrate Judge who had recommended a finding that Respondents had not violated the 1971 plan or consent order. The Magistrate Judge held a second trial and on August 26, 1997, issued a second report and recommendation, which recommended a finding of unitary status. Pet. App. 188a-314a.

On October 26, 1998, the District Court entered an order in which it rejected the Magistrate's recommended finding of unitary status at the same time it accepted virtually all of the Magistrate's subsidiary and other findings. Pet. App. 57a-187a. The District Court ruled the 1994 amended motion to enforce to be moot. Pet. App. 187a. Respondents filed a Motion to Alter or Amend Judgement. On December 4, 1998, the District Court denied that motion insofar as it sought amendment or alteration, but granted it in part as a request for clarification. Pet. App. 42a-56a.

Respondents appealed both of the District Court's orders to the Eleventh Circuit Court of Appeals. A three judge panel of the Court issued its opinion on March 16, 2001, in which it reversed the District Court and remanded the case with instructions that Respondents be released from court supervision. Petitioners did not seek rehearing. Neither did they seek to stay the Court of Appeals' judgment. On April 26, 2001, the District Court therefore entered

judgment in accordance with the Eleventh Circuit's mandate, and terminated its supervision of Hillsborough County schools.

ARGUMENT

Petitioners present three arguments for the granting of their petition. Respondents will answer each in the order originally presented.

I. The Decision of the Court of Appeals Does Not Conflict With This Court's Decisions or Those of Other Circuits and it Does Not Improperly Shift the Burden of Proof on Unitary Status Issues to Plaintiffs.

Petitioners misstate the holding for which review is sought. The specific, express, and narrow holding of the Court of Appeals was that the District Court applied an incorrect legal standard to the record before it, and its reliance on that standard "tainted and infected" its ultimate conclusion that Respondents had not attained unitary status as well as certain, specified subsidiary findings. Pet. App. 40a-41a.

Petitioners do not even address the Court of Appeals' holding, much less challenge its correctness. Indeed, they cannot, given the irrefutable fact that the District Court based its analysis and holding on the Eleventh Circuit's decision in *Lockett v. Board of Education of Muscogee County*, 92 F.3d 1092 (11th Cir. 1996) ("*Lockett I*"). In its opinion, the District Court expressly acknowledged that this opinion had been vacated, by the same panel which decided it, in *Lockett v. Board of Education of Muscogee County*, 111 F.3d 839 (11th Cir. 1997) ("*Lockett II*"), but explained that the withdrawn opinion "reiterated established principles of law which are applicable to the case at hand." Pet. App. 128a.

Petitioners do not contest the Court of Appeals' rejection of that rationale.

Neither do Petitioners challenge the Court of Appeals' description of the fatal impact of the District Court's erroneous reliance on *Lockett I*. They accept without objection the Court of Appeals' conclusion that the District Court incorrectly considered the Magistrate's report and recommendation, and assessed Respondents' conduct, under the standard that school districts seeking release from desegregation orders must show fulfillment with their obligations to "desegregate to the *maximum* extent practicable," when the proper measure, quoted in the petition itself, is whether "the vestiges of past discrimination [have been] eliminated 'to the *extent practicable*.'" Pet. App. 32a, emphasis in the original.

Petitioners cite *Lockett II*. They make no mention whatsoever of *Lockett I*, or the District Court's incorrect use of the vacated opinion. That omission, and Petitioners' failure to even acknowledge the actual holding at issue, are fatal to their argument of conflict, because Petitioners cite no opinion, of any court, with which the true holding of the Eleventh Circuit conflicts. Realizing this fact, Petitioners avoid what they cannot attack, attributing to the Court of Appeals a holding it did not pronounce and attempting to focus this Court's attention on a conflict which does not exist. Petitioners complain that the Eleventh Circuit engaged in nothing less than a "fundamental reallocation of the burden of proof in school desegregation cases." Pet. 9. There was no such reallocation. The Eleventh Circuit applied the correct law to the case at its hand. Its holding was informed by the application of that law, not on reallocation of the burden of proof, and there is no conflict between the Court of Appeals' ruling and the rulings of this or any other court.

Petitioners' arguments are constructed entirely upon dicta contained in the Court of Appeals' opinion. Petitioners mischaracterize these words as a holding that once a school district, placed under a court's supervision because of *de jure* racial segregation, demonstrates that demographics are a "substantial cause" of currently existing racial imbalances, the district no longer carries the ultimate burden of proving that the imbalances are not the product of past discrimination. The Court of Appeals made no such pronouncement, nor did it apply such a principle.

The Eleventh Circuit began its review of the District Court's ruling by enunciating the indisputably correct standard to be applied by courts assessing a school district's unitary status:

> [u]ntil unitary status is attained, the defendant school board has the burden of showing that any racial imbalance in the school system is not traceable, in a proximate way, to the prior *de jure* segregation. . . . Stated differently, once a plaintiff shows *de jure* discrimination (as [Petitioners] did here in 1962 . . .), a presumption arises that all racial imbalances in a school district are the result of the *de jure* segregation. To rebut this presumption, 'a school board must prove that the imbalances are not the result of present or past discrimination on its part.' (citing *Freeman*, 503 U.S. at 494; *Keyes v. School Dist. No. 1, Denver, Col.*, 413 U.S. 189, 208; *Swann*, 402 U.S. at 25; and *Lockett II*, 111 F.3d at 843). Pet. App. 30a.

This standard, with the presumption of causation

which is a part of it, was applied by the Court of Appeals, which found that Respondents had met it. Part of that holding was based on demographic evidence offered by Respondents. Petitioners do not challenge the findings both of the District Court and the Court of Appeals that Respondents proved that demographic change was a "substantial" cause of the racial imbalance of which Petitioners complain. They complain only that the evidence was insufficient to prove that demographics *alone* caused the offending imbalances.

Respondents were not required to prove that population shifts caused *all* of the racial imbalance identified by Petitioners. They had to show that the present imbalance was not a vestige of their past acts of *de jure* discrimination. That obligation included the task of overcoming a judicially imposed presumption in favor of causation. The Court of Appeals found that Respondents defeated the *presumption* that they *caused* the existing imbalances by presenting proof that demographics were a substantial cause of those imbalances. That finding did not relieve Respondents of their ultimate *burden* of proving that they did *not* cause the imbalances. The court of Appeals in fact applied that burden and found that Respondents had met it.

In reality, Petitioners do not seek the benefit of the established and unquestionably appropriate presumption described above, but rather want to impose on Respondents a different obligation, to rebut the non-existent presumption that demographic change, found or conceded by the Court of Appeals, the District Court, the Magistrate Judge, and Petitioners themselves (Pet. App. 17a), was the result of segregative school board action. It is only the imbalance that carries the benefit of a presumption. There is no concentric presumption that a non-segregative cause of the imbalance proffered by a school board to explain the imbalance is itself

a vestige of past illegality.

It was in response to Petitioners' arguments to the contrary, and in the specific context of demographic evidence proffered by Respondents, that the Court of Appeals wrote the dicta on which Petitioners' assertion of conflict solely depends:

> Where a defendant school board shows that demographic shifts are a substantial cause of the racial imbalances, the defendant has overcome the presumption of *de jure* segregation. Courts shall not assume that *demographic shifts* are a result of the past *de jure* segregation. Such an assumption is improper because 'it is simply not always the case that *demographic forces* causing *population change* bear any real and substantial relation to a *de jure* violation, and the law need not proceed on that premise. Lastly, a plaintiff does not undermine the strength of a defendant's *demographic evidence* by merely asserting that demographics *alone* do not explain the racial balance. Rather for a plaintiff to preserve the presumption of *de jure* segregation, the plaintiff must show that demographic shifts are the result of the prior *de jure* segregation or some other discriminatory conduct. Pet. App. 35a-36a (citations and footnote omitted, emphasis added).

The Court of Appeals' recitation of controlling legal principles is correct in every way. The language used, although attributed to *Lockett II*, has its origins in *Freeman*,

503 U.S. at 496-497, in which this Court instructed:

> The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that presumption. As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system.

In order to dispel the presumption of causation applied to racial imbalances within its schools, Respondents were not limited to the use of demographics. Instead they were required to show, as Petitioners correctly observe, "that this segregated schooling is not also the result of *intentionally* segregative acts." Pet. 9, (citing *Keyes*, 413 U.S. at 208, emphasis added). Respondents could use demographics to meet this burden. But they could also make use of other proof, and they did.

Respondents proved, and the District Court found, that the 16 schools (of the 150 operated by Respondents in the 1995-1996 school year, Pet. App. 15a) of whose racial imbalance Petitioners complained had never had African-American majorities in their student populations prior to implementation of the 1971 desegregation plan, had in fact been "white" schools before that year, and were racially balanced immediately upon the plan's implementation.

Respondents proved, as the District Court found, that they took no action to change the boundaries of any of these schools, or any other action, to intentionally cause, or to exacerbate, the race ratios of those schools' student populations. App. 125a, 129a. Respondents proved that they effected no boundary change, nor did they construct, close, or reconfigure any school, or otherwise alter school attendance patterns, without prior notice to Petitioners and the Court, and the District Court took no action to disapprove the proposed changes or alter race ratios, save for its orders of 1975, requiring a supplemental plan, and 1990, sustaining Petitioners' objection to the establishment of a magnet program to Blake.

To all of this proof Respondents added unrebutted evidence that there had been significant and substantial shifts in racial demography, not in Hillsborough County as a whole, but within the relevant neighborhoods which populated the schools in question.[3] To this record, the Magistrate and the Court of Appeals, but not the District Court, applied the proper legal standard and found it had been met.

Petitioners do not attack that narrow holding of the Eleventh Circuit, which focused on the District Court's use of an erroneous legal standard. They instead contend, erroneously, that the Court of Appeals assigned to Petitioners a burden which should have been borne by Respondents, and

---

[3]As the Magistrate found, and no one challenges, from 1970 until 1990 (the latter being the year of the most current census data available at the time of hearing), the number of Hillsborough County census tracts having populations with 25% to 50% black residents more than doubled, while tracts with 50% or more blacks have increased by 40%. Pet. App. 205a.

that this "reallocation" conflicts with the holdings of this Court and two other Courts of Appeals. There was no reallocation.

Petitioners assertions of conflict between the Court of Appeals and this Court's holdings rely on cases which do not address the issue Petitioners argue. Petitioners cite *Board of Education v. Dowell*, 498 U.S. 237 (1991), for the proposition that before a court releases a formerly segregated school system from its oversight, it must determine that, to the extent that demographics account for any racial imbalance, the "change is 'not attributable to the former *de jure* regime or any later actions by school officials.'" Pet. 10. This Court did not establish a presumption that it was. The Court of Appeals did not free Respondents of the burden enunciated in *Dowell*, or impose a contrary burden on Petitioners. The District Court did not find, and Petitioners do not assert, that actions taken by Respondents caused any of the demographic changes proven to have occurred.

There is no conflict between the Court of Appeals' holding and *Dowell*. The recognition of the presumption argued by Petitioners *would* create conflict, with this Court's holding in *Freeman*, 503 U.S. at 496-497, discussed above. The Court of Appeals' actual holding does not.[4]

---

[4] Neither does the Court of Appeals' comment that a plaintiff does not "undermine" a defendant school board's demographic evidence by contending that the proof does not explain all of the imbalance at issue demonstrate a reallocation of the burden of proof. It is simply a comment on the insufficiency of the evidence offered by Petitioners, through their expert witness, which could have no intended purpose other than to "undermine" Respondent's offer of proof. It in no way suggests that Petitioners had an obligation to rebut, much less to prove.

Neither does the language of *Swann,* 402 U.S. at 21, quoted at page 11 of the petition, demonstrate conflict. That language speaks to the need for district courts overseeing school desegregation to monitor school construction and closings. The District Court's own 1971 order included the express direction that "all school construction, school consolidation and site selection . . . shall be done in a manner which will prevent the recurrence of the dual school structure." Resp. App.69b. The District Court did monitor compliance. From the date of its 1971 desegregation order to the present Respondents have not constructed, closed, consolidated, or reconfigured any school without first informing the District Court and Petitioners of their intentions.

When Respondents sought to establish a magnet program at Blake Junior High School to reduce the percentage of African-American students at that school, and Petitioners objected, the District Court prevented Respondents from proceeding. As the Court of Appeals noted, this ruling delayed the implementation of Respondents' magnet school program, the scope of which the District Court later found inadequate. Pet. App. 22a.

There has been no finding by the District Court that Respondents did not meet their obligations in the areas of school construction, or school openings and closings. Indeed, in denying unitary status, the District Court expressly found that Petitioners' "opening and closing of schools has generally maintained or improved racial balance" and disavowed any inclination to become further involved in school siting and construction issues. Pet. App. 173a-174a. In its earlier orders, the District Court had required approval of school site locations. Resp. App. 88b.

Petitioners' remaining arguments alleging conflict with this Court's opinions rely upon the concurring opinion authored by Justice Blackmun in *Freeman*, 503 U.S. at 513, not the law pronounced in the majority opinion. Even at that, Petitioners provide no evidence of conflict. The words cited speak to the need to determine that school board actions did not create or contribute to demographic imbalance. They do not impose a presumption that they did.

Neither does the Eleventh Circuit's opinion conflict with those of the Tenth Circuit in *Brown v. Board of Educ.*, 978 F.2d 585 (10th 1992) and *Dowell v. Board. of Educ.*, 8 F.3d 1501 (10th Cir. 1994). *Brown* merely affirms the burden on school districts to demonstrate "the absence of a causal connection between any current condition of segregation and the prior system." 978 F.2d. at 590. The Eleventh Circuit properly enforced that same burden here. Petitioners assert that, under the Tenth Circuit's "approach," a school system cannot meet its burden through demographic evidence "unless the current racial imbalance is 'only a product of demographic changes outside the school district's control.'" Pet. 14-15. In fact, and as the complete portion of the dicta from which Petitioners take only a part makes clear, the fundamental determination to be made is whether the more condition of imbalance is a vestige of the former system. *Brown*, 978 F.2d at 591. *Brown* does not make use of a presumption that a desegregated school system caused the demographics.

Indeed, *Brown* demonstrates the correctness of the Eleventh Circuit's holding, and its consistency with controlling law. In rejecting the district court's opinion at issue in *Brown*, the Tenth Circuit wrote:

> In the present case, the district court did state: 'Demographic forces, uncontrolled by

> defendants form the racial composition of the schools.' This comment, however, is in considerable tension with the district court's observations that demographics have had a desegregative effect on student assignment.... Moreover, in light of the school district's failure to ever operate without racially identifiable schools, and the district court's failure to apply the appropriate legal standard, the court's conclusion that demographics caused segregation simply does not amount to a supportable holding that the current condition of segregation is wholly unconnected with the prior de jure school system. The absence of a moment when [the school system] achieved compliance with the Constitution is vital because it is only '[o]nce the racial *de jure* violation has been remedied [that] the school district is under no duty to remedy imbalance that is caused by demographic factors.' 978 F.2d. at 590, n.6.

Respondents not only operated without racially identifiable schools, at the District Court's instruction they did so after closing all schools which had been used to segregate African-American students. Even as it denied unitary status, the District Court found that "a race neutral attendance pattern was implemented in the case at hand," and noted that Respondents did desegregate their system. Pet. App. 125a-126a, 62a. Demographics in Hillsborough County were *not* desegregative in regard to the schools being examined, and the District Court so found. The Tenth Circuit found in *Brown* that the district court opinion which it reviewed was "in considerable tension" with the record on which the opinion had to be based, and the lower court used an incorrect legal

standard. So too did the Eleventh Circuit in the case before it.

Petitioners' use of the Tenth Circuit's opinion in *Dowell* is also unavailing. They write in their petition that the Tenth Circuit requires a showing that "the school system did not play a role in, or contribute *in any way* to, the demographic change. Pet. 14, citing *Dowell*, 8 F.3d at 1511, n.6, emphasis added. In fact, what the Tenth Circuit, relying on the concurring opinions in *Freeman*, required, at the cited part of its holding, was a showing by the board that "its own policies did not contribute *directly* to the racial imbalance of the schools." *Id.* emphasis added. And it did so after quoting the principle that "[The fact t]hat there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or its duties under the law." *Dowell*, 8 F.3d at 1511 (citing to *Freeman,* 503 U.S. at 494).

Neither does the Eleventh Circuit's holding conflict with the holding of *Jenkins v. Missouri*, 122 F.3d 588 (8th Cir. 1997). The Eighth Circuit upheld the district court's determination that the school board had failed to demonstrate that prior inequities in student achievement caused by *de jure* segregation had been remedied and it therefore bore the onus of the presumption that its actions had caused the current conditions. As in *Brown,* the court in *Jenkins* dealt with a system unlike Respondents.' In this case, at the District Court's direction, the racially segregated patterns of student assignment were abolished once and for all in 1971. Moreover, in *Jenkins*, the Eighth Circuit noted that the district court's finding was supported by the fact that the school district's expert was unable to explain a third of the gap that existed between black and white student achievements. There was no unexplained gap in this case.

The same expert who testified in *Jenkins* testified in this case, and he opined without qualification that demographics *did* cause the racial imbalances that existed in Respondents' schools, and that *none* of these imbalances was caused by Respondents' actions. Pet. App. 120a. This conclusion was shared by Respondents' demographic expert. Petitioners met that proof by providing their own witness, who could say only that the work of Respondents' demographer was "very good" but did not allow *him* to attribute *all* of the imbalances to demographics. App. He did not identify the gap between Respondents' expert's data and "all." He did not testify that it was substantial.

Petitioners do not contend that the remaining cases they cite conflict with the Eleventh Circuit's holding, only that they do not support it. Pet. 15, n.15. The cases therefore provide no support for the granting of the writ. Petitioners have not in any way addressed the actual holding of the Court of Appeals. They have not shown any conflict between that holding and that of any other Court.

II. The Court of Appeals' Interpretation of the Good-faith Standard Does Not Conflict With the Framework Established by this Court's Decisions in *Freeman* and *Dowell* and with the Tenth Circuit's Interpretation.

Petitioners complain that the Court of Appeals failed to apply the proper legal standard in reversing the District Court's finding that Respondents did not demonstrate good faith sufficient to warrant a finding of unitary status. Specifically, Petitioners, relying on the Tenth Circuit's opinion in *Dowell*, 8 F.3d 1501, complain that the Court of Appeals did not require Respondents to show "future-oriented board policies manifesting a continued commitment to desegregation." Pet. 21, citing *Dowell*, 8 F.3d at 1513. This

argument is new to Petitioners' litigation strategy, appearing for the first time in their petition.

In her report and recommendation, the Magistrate Judge specifically found that Respondents had demonstrated good faith sufficient to support a finding of unitary status. Pet. App. 265a-266a. The Magistrate reached that conclusion by applying the standard enunciated in *Freeman*, 503 U.S. at 498, on which Petitioners now rely. In the exceptions they filed to the Magistrate's report and recommendations, Petitioners did not raise the contention now argued in support of the petition, contending only that Respondents had not shown past compliance with the District orders. Resp. App. 112b-113b. They did not argue the lack of "future-oriented" policies, nor did they challenge the Magistrate's finding of Respondents' future intentions. The District Court treated the issue of Respondents' good faith only as it related to past compliance with its orders. While it rejected the Magistrate's finding of good faith, the District Court did not criticize the Magistrate's focus, or reject her determination, based on testimony from Respondents' Superintendent and most School Board members which she, but not the District Court had observed, that Respondents had "accepted the principle of racial equality and will not revert back to a dual system." Pet. App. 265a-266a.

The Court of Appeals reversed the District Court based on its uncontested conclusion that the District Court applied an incorrect standard of law which infected and tainted the District Court's determinations. Once the Court of Appeals rejected the District Court's finding that Respondents had not fulfilled all of their court imposed obligations, the District Court's ultimate conclusion of a lack of good faith, which depended entirely on past noncompliance, could not be sustained. Petitioners make no complaint as to these findings.

The Tenth, Eleventh, and all other Circuit Courts of Appeals look to the post-desegregation order past to predict a school board's future compliance with the Constitution. Both are bound by the reality that compliance with a desegregation order can be assessed only with reference to that order, which must include a "precise statement" of the district's obligations. *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995). Here the Eleventh Circuit applied the proper law to the record created by the parties and the District Court. It committed no error in doing so.

III. The Court of Appeals Did Not Misapply Governing Law in its Review of the District Court's Factual Findings.

Petitioners' last contention is that the Court of Appeals subjected the District Court's findings to "more stringent scrutiny" because the trials which produced the record on which it made those findings were conducted by the Magistrate Judge. They contend that this heightened analysis deprived Petitioners of the benefit of the clearly erroneous standard, which should have been used to review the findings in question. Once again, Petitioners misstate the true holding of the Court of Appeals. The Court held that the District Court's findings were "tainted and infected" by its use of an incorrect legal standard. For that dispositive reason, the Court of Appeals rejected the District Court's findings made after that misinformed analysis.

> If the district court had applied *Lockett II*, rather than *Lockett II*, her findings of fact would have led her to the same conclusion as the magistrate judge with respect to student assignments. Pet. App. 36a.

***

> Additionally, we are persuaded that, if the district judge had followed *Lockett II*, she would have concluded that [Respondents] have acted in good faith. Pet. App. 38a.

Petitioners' final point turns on the fact that the Court of Appeals noted in dicta that its conclusion of District Court error on the issue of good faith were "buttressed" by two points. Pet. App. 39a-40a. These were the District Court's discussion of the extent of Respondents' use of a majority-to-minority transfer policy, and the fact that because a judicial determination of good faith "is in some respects subjective," deference should have been paid to the Magistrate's finding of it. *Id*. Tellingly, Petitioners do not complain about the Court of Appeals' discussion of the former. They accept, as did the District Court based on Petitioners' expert's testimony, that Respondents' more aggressive use of their majority-to-minority policy would have had no significant effect on the student populations of the schools at issue before it. Petitioners take issue with the Court of Appeals findings in the areas of statistical demographic evidence and good faith. However, the Court of Appeals spoke of deference to the Magistrate's findings only in the context of the latter, and then only as support for a conclusion reached on other grounds. The Court did not, as Petitioners incorrectly assert at Pet. 25, find the Magistrate's resolution of credibility "dispositive."

The Court of Appeals' holding did not depend on any determination that the Magistrate's findings were entitled to more weight than they were due, or the Magistrate's resolutions of credibility. It found only that having applied the proper standard of law, the Magistrate's conclusions were correct, while the District Court's, because they were guided by the wrong law, were not.

The Court of Appeals did not ignore the clearly erroneous doctrine. It expressly noted that the application of an incorrect legal principles requires an exception to the appellate principle requiring the demonstration of clear error before overturing a trial court's findings of fact. Pet. App. 26a-27a. Petitioners do not challenge this statement of law, or the Court of Appeals' determinations based on it. They sidestep again, relying on more dicta in the Court of Appeals' opinion to reargue the Court of Appeals subsidiary findings.

The District Court noted, despite its findings of a lack of good faith, that Respondents had only a "short road to travel" to unitary status. App. 185a. It expressly found that Respondents had been "relatively successful in implementing desegregative techniques. App. 130a. And it concluded that, "[u]ndoubtedly, [Respondents] have been effective in desegregating [their] system." App. 93a. To hold, as the Court did, that Respondents nevertheless could not be declared unitary, because they did not take unspecified additional steps, was error.

In fact, and as the Court of Appeals found, Respondents' demographics data were reliable, and the District court used them as a basis for its finding, stated several times in its opinion, that demographics were a "substantial cause of racial identifiability" in Respondents' schools. Pet. App. 108a. The District Court, using that data, expressly found it "probable that these few [schools contested by Petitioners] would have become racially imbalanced regardless of [Respondents'] efforts." Pet. App. 110a. It found, using the same data, that the schools which were racially imbalanced were all located in the vicinity of other schools with high black enrolments and making adjustments to the attendance zones for the purpose of improving balance, "would be the expense of neighboring schools which are on

the verge of becoming racially identifiable." Pet. App. 96a, 120a. It accepted the opinion of Respondents' expert, using the same data, that "shifts in the inner-city population made it very difficult to adjust attendance boundaries to maintain [racial balance]." Pet. App. 95a.[5]

Moreover, the District Court's stated concerns with the demographic data were that they included more potential students than would be attending the various schools in question and reflected black percentages less than those reflected in actual school attendance. The concerns are not material. The District Court found that the imbalanced schools being addressed served attendance areas which were largely unchanged for long periods of time. Pet. App. 88a-93a. No African-American students were brought to these schools from outside the attendance areas. Pet. App. 209a. Thus it was undisputed that each and every student attending any of the schools in question lived in its attendance zone, regardless of whether he or she was accurately recorded by census takers. And the unquestioned thrust of the report authored by Respondents' expert was that Hillsborough County experienced dramatic black population growth in several of its geographical distinct parts. This thesis was not challenged by Petitioners, and was accepted by the District Court, based on the only data offered at trial.

---

[5]The District Court also noted that Petitioners' expert conceded that redrawing boundaries to improve racial balance at one school could worsen it at others. Pet. App. 120a. While the expert also opined that Hillsborough County was not highly segregated and, therefore, redrawing boundaries remained a viable option, the District Court noted that this last opinion was reached based on consideration of only five schools. Pet. App. 120a-121a.

To all of this must be added that facts that the District Court, in 1971, specifically rejected the concept of transporting large numbers of white students to attain racial balance, because of concern for "flight," that this concept was confirmed in 1998 by the same Court, writing that "bus[ing] children across the county to ensure racial compositions that comport with the county-wide ratios . . . would not be practicable and was not required by the Court's 1971 Order . . . the constitution or governing law," the express finding that Respondents' school openings and closings "generally maintained or improved racial balance" (Pet. App.173a), and the findings that "[Respondents] have not "affirmatively exacerbated racial imbalances. . . ." (Pet. App. 129a), and "[t]here is no indication that the racial identity of [Respondents'] schools has been deliberately caused by segregative policies or practices by [Respondents] (Pet. App. 125a)." In short, Respondents proved all that was required of them to demonstrate unitary status, and the Court of Appeals properly so found.

CONCLUSION

The holding of the Eleventh Circuit in this case was that the District Court applied the incorrect legal standard to the record before it, and that error infected and tainted its ultimate conclusion to a point that reversal was required. Petitioners do not challenge that holding. Their attempts to raise issues and matters not decided by the Court of Appeals does not warrant a grant of certiorari.

Respectfully submitted,

W. Crosby Few
Few & Ayala
109 North Brush Street
Suite 201
Tampa, Florida 33602
813-229-6401

Thomas M. Gonzalez
Counsel of Record
Thompson, Sizemore
& Gonzalez, P.A.
109 North Brush Street
Suite 200
Tampa, Florida 33602
813-273-0050

APPENDIX 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
TAMPA DIVISION

[Filed December 10, 1958]

Civil Action No. 3554
Julian A. Blake, Clerk

ANDREW L. MANNING, a "minor, by his father and next Friend, WILLIE M. MANNINGS; SHAYRON B. REED and SANDRA E. REED, minors, by their father and next friend, SANDERS B. REED; NATHANIEL CANNON, NORMAN THOMAS CANNON, TYRONE CANNON and DARNEL CANNON, minors, by their father and next friend, NATHANIEL CANNON, SR.; and GAIL RENE MYERS, a minor, by her father and next friend, RANDOLPH MYERS, Plaintiffs,

v.

THE BOARD OF PUBLIC INSTRUCTION OF

HILLSBOROUGH COUNTY, FLORIDA and CLYDE McLEOD, AL CHIARAMONTE, JOHN COLEMAN and MARVIN GREEN, Members of the Board of Public Instruction of Hillsborough County, Florida and J. CROCKETT FARNELL, Superintendent of Public Instruction in Hillsborough County, Florida, Defendant.

COMPLAINT

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to title 28, United States Code, §1343(3), this being an action which is authorized by law, Title 42, United States Code, §1983, to be commenced by any citizen of the United States to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Constitution and laws of the United States. The rights here sought to be redressed are rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and by Title 42, United States Code, §1981.

Type of Proceeding

2. This is a proceeding for a permanent injunction enjoining the defendants herein from continuing to pursue their policy, custom and usage of operating the public schools of Hillsborough County, Florida on a racially segregated basis, in violation of rights secured to the plaintiffs by the due

process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and by Title 42, United States Code, §1981.

3. This proceeding is brought es a class action by the plaintiffs on behalf of themselves and on behalf of other persons similarly situated, pursuant to the provisions of Rule 23(a)(3) of the Federal Rules of Civil Procedure, The plaintiffs and the members of the class which they represent are minor Negro children and their parents, who are citizens of the United States and of the State of Florida, residing in the City of Tampa, Florae All of the minor children are eligible to attend the publi. elementary schools maintained and operated by defendants. The minor children are all similarly effected by the policy of the defendants which is attacked in this complaint in that all the minor plaintiffs are required to attend public elementary schools which are maintained and operated by defendants for Negro children exclusively and are denied the right to attend certain other schools which are more conveniently located for them solely because of their race and color. The persons which constitute this class are so numerous as to make it impracticable to bring each member of the class before the court, but there are common questions of law and fact involved affecting the several rights of the members of the class and a common relief is sought for all of the members of the class. The minor plaintiffs and their adult parents adequately represent the class.

4. The plaintiffs in this case are Andrew L. Mannings, a minor, by his father and next friend, Willie M. Mannings; Shayron B. Reed and Sandra E. Reed, minors, by their father and next friend, Sanders B. Reed; Nathaniel Cannon, Norman Thomas Cannon, Tyrone Cannon and Darnel Cannon,

minors, by their father and next friend, Nathaniel Cannon, Sr.; and Gail Rene Myers, a minor, by her father and next friend, Randolph Myers. The minor plaintiffs and their fathers are Negro citizens of the United States and of the State of Florida, residing in the City of Tampa, Florida, which is located in Hillsborough County, Florida. Each minor plaintiff is eligible under the laws of the State of Florida to attend the public elementary schools operated by he defendants in this case. Each minor plaintiff, with the exception of one, Gail Rene Myers, is presently enrolled in a Negro elementary school under the jurisdiction, management and control of defendants. Gail Rene Myers will be eligible to enroll in school for the first time in September 1959.

Defendants

5. The defendants in this case are The Board of Public Instruction of Hillsborough County, Florida and Clyde McLeod, Al Chiaramonte, John Coleman and Marvin Greene, members of The Board of Public Instruction of Hillsborough, County, Florida and J. Crockett Farnell, Superintendent of Public Instruction of Hillsborough County, Florida. The Board of Public Instruction maintains and operates the public school system of Hillsborough County, Florida, pursuant to the laws of the State of Florida. The defendant J. Crockett Farnell is the Superintendent of Public Instruction of Hillsborough County, Florida and, as such is the chief administrative officer of the Board of Public Instruction of Hillsborough County, Florida. The individual members of the Board of Public Instruction of Hillsborough County, Florida, determine the policies of the Board.

Policy Of Which The Plaintiffs Complain

6. The plaintiffs herein allege that the defendants, acting under color of the authority vested in them by the laws of the State of Florida, have pursued and are presently pursuing a policy of operating the public school system of Hillsborough County, Florida on a racially segregated basis. Pursuant to this policy, 72 of the public schools of Hillsborough County are limited to attendance by white students only and 18 schools are limited to attendance by Negro students. Pursuant to this policy, many Negro students, including some of the minor plaintiffs, who reside nearer to schools limited to white students are required to attend schools limited to Negro students which are considerably removed from the places of their residences. In some instances, some of the minor plaintiffs and other minor Negroes similarly situated are required to travel as much as ten miles to attend a Negro elementary school, whereas they reside only two blocks from a white elementary school.

Defendants' Refusal to Change the Policy

7. On or about August 16, 1955, the defendants were formally petitioned by Negro parents of children eligible to attend the public schools of Hillsborough County, Florida, to abolish the segregation policy complained of herein. This formal, petition was followed by several letters on behalf of the Negro parents requesting defendants to desegregate the public schools of Hillsborough County, Florida. Despite this petition and despite the several letters directed to the defendants, the defendants have refused to discontinue the policy of operating the public schools of Hillsborough County, Florida on a racially segregated basis. Defendants'

refusal to change the policy of operating the public schools of Hillsborough County on a racially segregated basis operates to prevent the plaintiffs from being assigned to white schools nearer to their places of residence which they would attend if they were white and which they presently desire to attend.

Irreparable Injury

8. As a result of the refusal of the defendants herein to discontinue the policy of operating the public school system of Hillsborough County, Florida, on a racially segregated basis, the minor plaintiffs herein and the other minor Negro children similarly situated, have suffered and shall continue to suffer injury which is irreparable to them. It is, therefore, necessary for this court to issue an injunction enjoining the segregation policy in order that this irreparable injury to minor plaintiffs herein shall cease. The plaintiffs have no other speedy or adequate remedy at law to redress the injury complained of herein.

WHEREFORE, plaintiffs respectfully pray that this court advance this cause on the docket and order a speedy hearing of this case and that after such hearing this court enter a permanent injunction forever restraining and enjoining the defendants, their agents, employees, attorneys and successors and all persons in active concert and participation with them, from continuing to pursue the policy of operating the public schools of Hillsborough County, Florida on a racially segregated basis and enjoining them from refusing to permit the minor plaintiffs, and other minor Negro children similarly situated, to attend schools nearer their places of residence solely because of the race and color of said minor plaintiffs.

Plaintiffs pray that this court will allow them their costs herein and grant them such other, additional, or alternative relief as may appear, to the court to be equitable and just.

Francisco A. Rodriguea
703 Harrison/Street
Tampa 2, Florida

Constance Baker Motley
Thurgood Marshall
10 Columbus Circle
New York 19, N. Y.

Attorneys for Plaintiffs

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

*No. 3554 Civ. T
Wesley R. Thies, Clerk

[Filed May 11, 1971]

ANDREW L. MANNINGS., et al,)
Plaintiffs,)
)
vs.)
)
THE BOARD OF PUBLIC)
INSTRUCTION OF)
HILLSBOROUGH)
COUNTY, FLORIDA, et al)
Defendants)
)

OPINION AND ORDER

This is a school desegregation case. Named as defendants are the Board of Public Instruction of Hillsborough County, Florida, the members of the Board, and the

Superintendent of Public Instruction of Hillsborough County.[1] Hereinafter they will be referred to as "defendants" or "school board."

Since 1954 it has been clear that segregated schools are illegal and that school boards and the courts, if necessary, have a duty to take affirmative action to desegregate them.

On April 20, 1971, it became and is crystal clear that affirmative action ordered by this and other courts for that and consistently opposed by certain of the defendants, is legal.

To obviate any doubt that there is and has been state-compelled segregated schools in Hillsborough County, which this Court and others have previously found and again so finds, this opinion and order will necessarily be in some detail.

Some of this may not be known by some or all members of the present board, although it should be. To be sure that they do know, a copy of this Order and a copy of the

---

[1] Since the institution of this action the boards of public instruction have been renamed school boards. Art.9 § 4(a), Fla. Const. 1968; Chapter 69-300, Laws of Florida 1969; Section 230.21, Florida Statutes 1970. County superintendents of public instruction have been renamed superintendents of schools. Art.9 § 5, Fla. Const. 1968; Chapter 69-300, Laws of Florida 1969; Section 230.321, Florida Statutes 1970.

Under the provisions of Rule 25(d), F.R.Civ. P. the School Board of Hillsborough County, the present members of the School Board, and the incumbent Superintendent of Schools of Hillsborough County are now the defendants in this action as the successors in office of the 1958 defendants.

April 20, 1971, Supreme Court Opinion in Swann v. Charlotte-Mecklenburg Board of Education, _____ U.S. _____, 39 U.S.L.W. 4437 (1971) will be sent separately to each defendant. It is assumed that being informed each will fulfill his or her sworn obligation to "support and defend the Constitution of the United States," as did the Court. Each should remember that he is a defendant, and that the Court will uphold its obligation.

On April 14, 1971, the Court received a letter from the Superintendent of Schools of Hillsborough County, Dr. Raymond O. Shelton. Part of the letter reads:

> In response to a delegation of parents representing the Gorrie and Carver Elementary Schools in Tampa, the Hillsborough County Board of Public Instruction has directed that I inform the Court of the Board's desire to "unpair" schools in this County. It is the strong feeling of the parents from Gorrie and Carver Schools, a feeling in which the Board concurs, that education in the paired schools is deteriorating rather than improving.* * *
>
> The parents have documented many short comings in these schools which they attributed to pairing and are very concerned about the damage that is being done to children and also the damage that is being done to the public school system by "white flight".

The Court's most recent attempt to persuade and then require defendants to operate their school system in

conformity with the United States Constitution occurred in August 1970. At that time several orders were issued calling for the desegregation of various schools in Hillsborough County during the 1970-1971 school year. Since August 1970 important changes in law and fact affecting this case have supervened.

The school board filed a report in November 1970 which clearly indicated that the Court's desegregation orders were not having the intended effect of abolishing the dual system of schools in Hillsborough County. Second, the Court of Appeals for the Fifth Circuit handed down a string of opinions with respect to the disestablishment of segregated.school systems. Finally, on April 20, 1971, the Supreme Court of the United States in four 9-0 decisions set forth with clarity and precision the responsibilities of district courts and school boards in achieving an end to state-compelled school segregation.

A federal court is bound to consider any change, either in law or fact, which has supervened and affects a prior judgment. Bell v. Maryland, 378 U.S.226 (1964); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5 Cir.1969) . The Ccurt will therefore re-examine the status of the Hillsborough County School System from the standpoint of all essentials required to convert a dual school system into a unitary one.[2]

---

[2] The Court will concern itself principally with only one of the six essential elements which go to disestablish a dual system--student assignment.

HISTORY OF THE CASE

I

This action was begun in December 1958, over 12 years ago.[3] It is the oldest case on the active docket of the Court.[4]

The original complaint, filed December 10, 1958, alleged in part:

> * * * the defendants, acting under color of the authority vested in them by the law of the State of Florida, have pursued and are presently pursuing a policy of operating the public school system of Hillsborough County, Florida, on a racially segregased basis. Pursuant to this policy, 72 of the public schools of Hillsborough County are limited to attendance by white students only and 18 schools are limited to attendance by Negro students. Pursuant to this policy, many Negro students including some of the minor plaintiffs, who reside nearer to schools limited to white

---

[3] At the time this suit was instituted counsel for plaintiffs included Thurgood Marshall, an Associate Justice of the Supreme Court since 1967, and Constance Baker Motley, a District Judge in the Southern District of New York since 1966.

[4] The papers filed in this case, including pleadings, motions, exhibits, depositions, orders, and so forth, now weigh a total of 62-1/2 pounds and, when stacked on top of each other, rise 2 feet, 3 inches off the ground.

> students are required to attend schools limited to Negro students which are considerably removed from the places of their residences. In some instances, some of the minor plaintiffs and other minor Negroes similarly situated are required to travel as much as ten miles to attend a Negro elementary school, whereas they reside only two blocks from a white elementary school.[5] [Emphasis supplied.]

The complaint was dismissed by a judge of the Southern District of Florida, now retired, on August 7, 1959, on the ground that plaintiffs had not exhausted their administrative remedies available under the Florida Pupil Assignment Law. Section 230.232, Florida Statutes. [6]Plaintiffs appealed, and on April 13, 1960, the Court of Appeals reversed. Mannings v. Board of Public Instruction of Hillsborough County, 277 F. 2d 370 (5 Cir.1960) (hereafter Mannings I).

The Court of Appeals held:

> The Board seems to proceed on the assumption that the presence of the Assignment laws on the statute books legally excludes the possibility of the Board's continuing a policy of racial segregation in the

---

[5] Complaint, filed December 10, 1958. p.4

[6] Judge George Whitehurst. Hillsborough County was in the Southern District of Florida until October 28, 1962, when the Middle District of Florida was created. See Pub. L. 87-562, 76 Stat. 247, now codified in 28 U.S.C. § 89.

> county schools. It follows, it says, that injunctive relief would be inappropriate. This, of course, does not follow. Mannings I, 277 F.2d at 373.

After referring to "[t]he failure of appellee [i.e., the school board] to show any disposition to abandon the segregation policy, long pursued, and, since 1954, known to be illegal," the Court of Appeals declared:

> We conclude that, without being required to make application for assignment to a particular school, the individual appellants, both for themselves and for the class which they represent, are entitled to have the trial court hear their evidence and pass on their contention that the pupil assignment plan has not brought an end to the previously existing policy of racial segregation. In the event proof of this fact is made appellants would be entitled to their injunction as Mannings I, 277 F.2d at 375.

Subsequent to the reversal there were further proceedings in this case. Non-jury trial was held December 4-6, 1961, before another judge who has since been elevated to the Court of Appeals.[7]

On August 21, 1962, almost four years after the suit was commenced, Findings of Fact and Conclusions of Law

---

[7] Judge Bryan Simpson

were entered. Based on the evidence the Court found as matters of fact:

> 6. Prior to 1954, the public schools of Hillsborough County were operated on a completely segregated basis, i.e., certain schools were maintained and operated for the exclusive attendance of Negro children and certain schools were maintained and operated for the exclusive attendance of white children. The Negro schools were staffed by Negro personnel and the white schools were staffed by white personnel.
>
> 7. Prior to September, 1961 there was no change in the racial composition of any Hillsborouyh County school. On that date one seven (7) year old Negro boy (not a plaintiff here) was admitted to Bayside School, a school for handicapped children in the county.* * *
>
> 12. At the time of trial there were approximately 80,000 children enrolled in the 114 public schools of Hillsborough County, 20 of which schools are Negro schools and 94 of which are white schools. There are approximately 3,500 teachers. Attendance zone lines are established for each of the elementary schools as required by Florida Law (Section 230.23 Fla. Stat.) School attendance area lines are revised each year for the purpose of utilizing each school to its capacity.

In numerous instances attendance area lines for white and Negro schools overlap requiring Negro students to travel a considerable distance to attend a racially segregated school, when schools limited to white students are located within close proximity to their residence. Some of the minor plaintiffs here attend a Negro elementary school ten (10) miles from their residence, whereas they reside within two of\r three blocks from a white school.

The junior and senior high schools are operating on the feeder system. This means that graduates of Negro elementary schools are customarily promoted to Negro junior high schools and in turn to Negro senior high schools, and that graduates of white elementary schools are promoted to white junior high schools and in turn to white senior high schools. Thus, the compulsory biracial system started with elementary school through separate attendance areas carries through the final grade of high school.

Plant City is a community of about 15,000 inhabitants near the eastern edge of Hillsborough County, with a white high school in the east end of that town and a Negro junior-senior high school in the west end of the town. There are Negro and white residential sections near each high school. However, Negro students from the east end of town cross

the town to attend the Negro school and white students from the west end of town cross the town to attend the white high school.[8]

This pattern of mixed residential areas close to school exists in a number of other sections of the county. In each instance racially segregated attendance is brought about by reason of separate, overlapping dual school zone lines for white and Negro schools. In addition to the Ybor City section, such neighborhood areas include Old Port Tampa and West Tampa.* * *

13. * * * [The Record] is a clear demonstration of the way in which the Florida Pupil Assignment Law, and the resolutions adopted by the defendant Board thereunder, has been used as an instrument to balk attempts at desegregation, and not as a means to accomplish desegregation. Few parents have the time and the patience to follow through to the unexpected success that Mr. Saunders achieved a year and a half after he started

---

[8] At hearing on October 5, 1962, counsel for the school board asked the Court to amend its Findings so as to state that the evidence also indicated that many white students traveled considerable distances to attend white schools despite the existence of black schools closer to their homes. The request was denied since this is an action to vindicate the rights of black American citizens. Certainly however the record is clear that both whites and blacks have been obliged to attend schools not nearest their homes in order to perpetuate segregation.

> trying to enter his six year old child in the first grade of the elementary school nearest his home.
>
> 14. Whatever its merits in the abstract, the Florida Pupil Assignment Law, has been and is being discriminatorily and unconstitutionally applied by the defendant Board as a means of effectively resisting desegregation of the defendant school system. [Emphasis supplied]

Also on the basis of the evidence Judge Simpson concluded as a matter of law that:

> 1. On and prior to May 17, 1954, the public school system of Hillsborough County was operated on a compulsory biracial basis pursuant to the Constitution* * *and the laws of the State of Florida. * * * Separate schools were constructed, operated and maintained, staffed by white personnel for white pupils only. Separate schools for Negro pupils only were constructed, maintained and operated, staffed by Negro personnel.
>
> 2. Despite the United States Supreme Court decisions in Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (May 17, 1954) and 349 U.S.294 (May 31, 1955), and Cooper v. Aaron, 358 U.S.1 (September 29,1958) holding all state laws which either require or permit racial segregation in the public schools to be unconstitutional under the Fourteenth

Amendment, the defendants have continued to operate the Hillsborough County School System on a. racially segregated basis as a matter of custom, policy and usage. No steps have been taken by defendants to reorganize this biracial school system into a single, non-racial school system.* * *

4. The duty to initiate desegregation of the public school system of Hillsborough County, is cast upon the defendant school authorities under the decision in the instant case by the Court of Appeals for the Fifth Circuit.* * *

5. The existence of the Florida Pupil Assignment Law and the opportunity to apply thereunder for reassignment does not automatically and ipso facto relieve the defendants of their duty to operate the school system under their charge on a non-racial basis.* * *

The basic fault inherent in the present application of the criteria of the Pupil Assignment Law is tkat only after a Negro child has first been assigned to a segregated school, under the area attendance zone lines now in force, is he permitted to seek reassignment. * * *to remove discrimination, the initial assignment must not be based on racial grounds. * * *

> 6. The evidence shows that the Florida Pupil Assignment Law has been applied by these defendants in an unconstitutional manner to effect an unconstitutional result, that is to say, it has been applied so as to perpetuate and maintain racial segregation in the public schools of Hillsborough County, and it has been applied so as to defeat and evade in a racially discriminatory fashion, the attempts of parents of Negro children to transfer their children to previously all white schools. * * * in 1960 and 1961, when Negro parents sought reassignment of their children to white schools, the law was used to subject these pupils to investigation, tests, deliberations and determinations not applied to the application of white pupils seeking reassignment to white schools or to Negro pupils seeking reassignment to Negro schools.

In accordance with the Findings of Fact and Conclusions of Law of that date, an injunctive decree was issued on August 21, 1962. The decree found that the equities of the cause were with plaintiffs and permanently enjoined defendants and their successors in office from operating a racially discriminatory school system in Hillsborough County. The school board was given until October 30, 1962, to file a comprehensive plan of desegregation.

The plan, filed October 29, 1962, provided for integration of one grade a year, beginning with the first grade in the 19631964 school year. Under the plan the dual system of separate attendance areas for the first grade in each of the

schools wkere dual areas had theretofore existed would be abolished and a single attendance area was to be provided for attendance therein by first grade students located in such attendance area. Every child entering the first grade was to have the option of attending either (a) the school nearest his residence, or (b) the school nearest his residence wherein members of the child's race were numerically predominant. This arrangement was to be extended one grade a year each successive school year.[9]

Plaintiffs objected to the plan and submitted their own plan. It was their proposal that the school board draw up new attendance areas without regard to race for all its elementary schools, with elementary school children being required to attend the elementary school within their zone. The school board would be required by January 1, 1964, to submit a plan for desegregating all other grades.[10]

By order entered May 8, 1963, Judge Simpson approved the school board's plan with minor modifications. Judge Simpson wrote:

> To the extent that the injunctive features of the August 21, 1962 decree are not ordered immediately enforced herein, and in later orders of the Court, it is emphasized that deferment thereof is dictated by practical considerations and by the court's firm

---

[9] Defendants' Plan, filed October 29, 1962.

[10] Plaintiffs' Proposed Plan of Desegregation, filed November 16, 1962.

> conviction that orderly step by step implementation of its August 21, 1962 decree is both beneficial and necessary.* * *
>
> Unmodified, the plan as submitted and herein approved would require twelve (12) years, on a grade a year basis, before complete desegregation of Hillsborough County schools would be accomplished. It is extremely doubtful that the present Board of Public Instruction or its successors in office will find it necessary or desirable to stretch the process out to the fall of 1974 (this year's entering first graders will at that time be rising high school seniors. The amendment of the plan so as to accelerate its grade a year provisions should be and will be a matter for recurring reconsideration by the Court, upon application of plaintiffs or defendants, or upon the Court's own motion.

Following the order of May 8, 1963, these proceedings continued with unabated vigor. Motions and pleadings were filed, additional discovery was undertaken, exhibits and reports were docketed, hearings were held, and orders were entered.

The school board expedited its plan for desegregation by one year for the 1965-1966 school year, so that the plan's provisions were applied to fourth, as well as first, second, and

third graders.[11] The plan was again expedited the following year: during the 1966-1967 school year it was applicable to all students in grades one through six.[12]

Upon Judge Simpson's appointment to the Court of Appeals the case was assigned to Judge Joseph P. Lieb in early 1967.

On May 15, 1967, Judge Lieb entered an Order on Motion for Further Relief which superseded the order of May S, 1963, and directed the implementation of a new plan of desegregation. Commencing with the 1967-1968 school year, a single system of non-racial attendance areas was to be established for all Hillsborough County schools. Each student was to be assigned to the school or schools in the attendance area of his residence. Where there was more than one school in such attendance area offering the same grade to which the student was eligible, he would have a "free choice" among such schools, and no choice was to be denied for any reason other than overcrowding.

Transfers to schools outside an attendance area would be perm/tted for handicapped students or students with special course needs. A majority to minority transfer provision was adopted; that is, the school board would on request permit any student to transfer from a school where his race was in the majority to one where it was in the minority. Finally, the

---

[11] See Defendants' Fourth Supplemental Progress Report, filed November 30, 1965.

[12] See Defendants' Fifth Supplemental Progress Report, filed November 8, 1966.

Order required the defendants to take prompt steps to equalize facilities at the formerly black schools.

On its face the plan appeared to be a zoning-type desegregation plan, but actually it was a type of freedom of choice plan. It combined the use of attendance areas with freedom of choice, the freedom of choice being limited to the schools within the student's attendance area. Most of the white schools were placed in attendance areas containing only one school. But every school that was black was placed in attendance areas with one or more white schools.[13] Students in these areas were thus given the option of attending a white school or a black school. As the school board later phrased it, this "enabled the students, without regard to race to have a free choice of more than one school where the student's race was in the minority."[14]

On December 16, 1968, plaintiffs filed a motion for further relief. It alleged:

> [T]he report on the operation of the Freedom of Choice Plan filed with the Court by defendants pursuant to the My 15, 1967 Order of this Court demonstrates that the Freedom of

---

[13] This Court considers and defines a white school as a school that is attended by white students only, or whose student body is at least 95% white. A black school is a school with a student population that is all black or at least 90% black. See Supplemental Findings of Fact, filed March 31, 1970; Singleton v. Jackson Municipal Separate School District, 434 F.2d 927, 931 (5 Cir.1970).

[14] Defendants' Comprehensive Plan for Racially Non-Discriminatory School System, filed April 15, 1969, p. 15.

> Choice-Attendance Areas Plan fails to provide a real prospect for dismantling the dual system at the earliest practicable date. During the choice period for the 1968-69 school year out of approximately 7,200 Negro elementary school children in Hillsborough County, only approximately 1,800 chose to attend white elementary schools and cf approximately 2,700 Negro high school students, only 850 chose to attend white high schools, and less than twenty (20) white elementary students chose to attend formerly all Negro schools, and no white high school students chose to attend all Negro high schools. * * * in the Junior high schools no white students chose to go to formerly all Negro junior high schools.

After a hearing on the motion, Judge Lieb entered an order on March 5, 1969, directing the school board, no later than April 15, 1969, to submit a comprehensive plan for establishing a raciall nondiscriminatory school system in Hillsborough County. In formulating the plan the school board was to consider rezoning, consolidation of schools, pairing of schools, or any other method which would effectively eliminate the dual system.

With assurance that "the proposed Plan submitted herewith promises prompt and meaningful progress toward establishing a racially non-discriminatory school system,"[15] the school board filed its new plan on April 15, 1969.

---

[15] Id. at p.1.

According to the school board, the Florida School Desegregation Consulting Center at the University of Miami, Coral Gables, Florida, had participated in the preparation of the plan.

Basically, the April 15, 1969 plan wax a slight revision of the plan put into effect by the order of May 15, 1967. It was not the school board's intention to substantially alter the plan already in operation.

> The present attendance areas have brought about desegregation of schools in many neighborhoods. Any further revision of the unified attendance areas would not increase desegregation with a few exceptions that will be discussed [later].* * *
>
> The shifts in population in some formerly predominately white neighborhoods have caused these communities to be predominately Negro. The Negro pupil population in the schools serving these communities has also increased proportionately. To increase the attendance area of any predominately Negro school or predominately white school to bring about more desegregation would cause students so assigned, both Negro and white [,] to travel unreasonable distances. Some schools will always be all Negro and some all white because the communities they serve are all of one race due to voluntary housing patterns.

> It then becomes necessary to unify the attendance areas of these schools to provide these students with the opportunity to attend a school where their race is in the minority.[16]

The system whereunder black schools were placed in attendance areas also containing white schools with students in these areas to choose which school to attend was continued. However, some of these attendance areas were unified. Boundary changes for the attendance areas of other schools were also made, "but the changes will not necessarily affect the racial composition of the schools."[17] In all other respects the plan of May 15, 1967, would be continued.

Plaintiffs objected to the plan. They complained that the plan was simply another free choice system with little prospect of successfully accomplishing desegregation:

> An analysis of this type of zoning reveals a blatant scheme for racial discrimination. Where Negro students are not involved, the defendants have one school attendance area. Where Negroes are involved, there are two or three schools involved, giving a white child[18] the option to continue to attend the white school.

---

[16] Id. at pp. 16-17

[17] Id. at p. 18.

[18] Plaintiffs' Objections to Defendants' Proposed Plan, filed May 5, 1969, p. 4.

Concluding that its plan was "inadequate, at the present time," Judge Lieb ordered the school board to "formulate and adopt a revised comprehensive plan specifically considering the use of zoning, pairing "* * *[19]

The plan was filed May 23, 1969. The attendance zones of seven elementary schools were to be revised.[20] Ten elementary schools were to be paired; that is, these schools were placed in five attendance zones with two schools in each zone.[21] Students would attend one of the two schools in their zone and would not have a choice of which school to attend because neither of the schools would have the same grades. The boundaries of six junior high schools would be altered.[22] Three of the senior high schools--Blake, Middleton, and Hillsborough, which under the May 15, 1967, order shared one attendance area--were to be given revised and separate attendance areas. In all other respects the plan of April 15, 1969, wculd be adhered to, and the provisions of that plan were inccrporated by reference into the present plan.

On June 2, 1969, plaintiffs filed objections tc the new plan. On July 18, 1969, the school board filed a motion fcr

---

[19] Order of May 9, 1969, pp. 1, 2.

[20] Roland Park, Macfarlane, Williams, Burney, Lincoln, Jackson Heights, Progress Village.

[21] Dunbar was to be paired with Cuesta; Lee with Henderson; Edison with College Hill; Orange Grove with Ybor; and Springhead with Glover.

[22] Just, West Tampa, Booker T. Washington, Young, Memorial, George Washington.

leave to amend the May 23, 1969, plan; this motion was denied the same date. On July 25, 1969, for the third time that year, the school board was ordered by Judge Lieb to submit satisfactory plans for desegregation.

The August 1, 1969, plan established attendance zones for each of the public schools in Hillsborough County. Each school had a separate attendance area except the Macfarlane-Cuesta School. The majority to minority transfer policy was continued. Any junior or senior high school student needing a course of study not offered by the school serving his attendance zone would be permitted to transfer to any school in the county offering that course of study. There were similar transfer provisions for exceptional and handicapped children. In certain cases transfers outside attendance areas were permissible for elementary school children.

Under the plan there were to be 783 blacks, 90 whites at Blake Senior High School, and 993 blacks, 137 whites at Middleton High School. There was to be a student population of 662 blacks, 36 whites at Just Junior High School; 609 blacks, 0 whites at Booker T. Washington Junior High School; and 1,000 blacks, 90 whites at Young Junior High School. Marshall High School in Plant City was to be paired with Tomlin Junior High School. Marshall would have the seventh and Tomlin the eighth and ninth grades.

Seven elementary schools--Carver, Dunbar, Henderson, Meacham, Potter, Roland Park, Shore--were to remain completely black, and 5 more were to be at least 90% black: College Hill, Lincoln, Lomax, Williams, Ybor. There

were to be large concentrations of blacks at Glover, Jackson Heights, Progress Village, and Simmons.[23]

Plaintiffs objected to the plan and asserted that alternatives existed whereby greater desegregation could be achieved.[24]

On August 18, 1969, Judge Lieb entered a Final Order approving the August 1, 1969, plan with minor qualifications. Mannings v. Board of Public Instruction of Hillsborough County, 306 F.Supp. 497 (M.D.Fla.1969) (Mannings II).

In September 1969 plaintiffs appealed. On November 19, 1969, Judge Lieb assigned the case to the undersigned, the fourth judge to preside over these proceedings.

II

On March 6, 1970, the Court of Appeals temporarily remanded the case for limfted purposes. This Court was directed to supplement its findings of fact by (a) filing maps showing the location of each school and the area served by each school so as to reflect student assignments as of October 24, 1969, and (b) filing a table showing the school population, by race, which would result if a neighborhood school attendance policy as defined in Ellis v. Board of Public

---

[23] These statistics are taken from the maps filed by defendants to accompany the August 1, 1969, plan.

[24] Plaintiffs' Objections, filed August 11, 1969.

Instruction of Orange County, 423 F.2d 203 (5 Cir.1970), were adopted.[25]

On March 31, 1970, the undersigned filed and forwarded to the Court of appeals the maps and table requested, together with 17 pages of supplemental findings of fact. These findings established that as of October 24, 1969, 91 of Hillsborough County's 124 public schools were identifiable as either black or white. Whites were to be found in 10 white schools containing 61,478, or 74%, of all the white students in the county. The blacks were concentrated in 21 schools containing 12,751, or 65%, of the county's black students. In particular, these findings demonstrated:

> (1) Fifty-two elementary schools with 36,214, or 82%, of the white elementary students were white schools. Sixteen elementary schools.with 8,530, or 74%, of the black elementary students were black schools.
>
> (2) Eleven junior high schools withal3,515, or 68%, of the white junior high students were white schools. Three junior high schools (Just, Booker T. Washington, Young) with 2,334, or 48% of the black junior high school students were black schools.
>
> (3) Seven senior high schools with 11,749, or 61%, of the white high school students were white schools. Two senior high schools (Blake

---

[25] For a discussion of the Ellis case, see below, pp. 26-28.

and Middleton) with 1, 887, or 58% of the black high school students were black schools.[26]

The supplemental findings also demonstrated that a neighborhood school attendance system would do little to eliminate the dual system. As the undersigned phrased it: "The extent of desegregation achieved by the neighborhood attendance plan is in effect indistinguishable from that achieved under the plan presently in effect[27]. Although it did file the table giving the projected school population resulting from neighborhcod attendance zones, the school board did not file maps showing these attendance areas, and so the Court's reliance on the figures given in the tables was based entirely upon representations made by the schcol board. At least with regard to attendance at Blake and Middleton Senior High Schools, these representations turned out to be highly inaccurate.

III

On May 11, 1970, the Court of Appeals reversed the order which had been entered by Judge Lieb. Mannings v. Board of Public Instruction of Hillsborough County, 424 F.2d 874 (5 Cir.19701 (Mannings III). A panel consisting of Judges Bell, Ainsworth and Godbold found "the Hillsborough system deficient in student assignment throughout the system." 427 F.2d at 876.

---

[26] Supplemental Findings of Fact, filed March 31, 1970.

[27] Id at p. 15.

As to student assignment the Court of Appeals, based on the supplemental findings of fact, found "that with the exception of the two all Negro high schools, there would be no substantial change in the racial composition of the schools in Hillsborough County under an Orange County type assignment system. For the reasons which follow, we conclude that the present assignment system is unacceptable as to certain schools." 427 F.2d at 876-877.

On the basis of the projections furnished by the school board in its table attached, to the supplemental findings, the appellate court found that a strict neighborhood assignment system would desegregate the two remaining black high schools. The school board's figures showed that under such a system there would be 877 blacks, 197 whites at Blake, and 1010 blacks, 250 whites at Middleton. In the alternative, the Court was authorized to pair Blake with Plant and Middleton with Hillsborough. The Court of Appeals directed that the three remaining black junior high schools, Just, Booker T. Washington, and Young be paired with Wilson or West Tampa, Franklin or Memorial, and Sligh, Memorial, or Franklin, respectively. Neighborhood attendance zones for the black junior high schools were rejected because according to the school board's table the resulting school population would have been:

	Black Students	**White Students**
Just	592	36
Booker T. Washington	624	15
Young	1,118	90

Turning to the elementary schools, the Court of Appeals stated: "There are 14 elementary schools with virtually alt Negro student bodies." 427 F.2d at 877. This was an error; as the supplemental findings vividly showed, there were 16 elementary schools at least 90% white.[28] The Court of Appeals directed that 6 of these schools be paired-- College Hill with Edison; Dunbar with Tampa Bay; Henderson with Graham; Lincoln with Jackson; Meacham with Gorrie; and Simmons with Burney or Wilson.

The Court of Appeals also stated that it was "conceivable" that "substantially the same result could be achieved in some of the elementary schools by redrawing zone lines instead of pairing." This Court was authorized to consider and permit rezoning as an alternative to pairing where the result would substantially desegregate student bodies, or to permit pairing in some instances and rezoning in others.

The majority to minority transfer policy was left intact. A biracial committee was ordered set up, The appellate opinion was to be implemented by June 6, 1970. Finally, this Court was directed to make its own conclusion by the standards stated in the opinion as to the system being unitary. Once it was found unitary, this Court was to retain jurisdiction for a reasonable period of time in order to insure unitary operation. By rehearing granted on June 2, 1970, the Court of Appeals approved the school board's request:

---

[28] The omitted schools were Jackson Heights and Progress Village. Rounded off to two decimal points each school was exactly 90% black 10%white.

> to realign the attendance zones for Just, Booker T. Washington and Young junior high schools as an alternative to pairing Just with Wilson or West Tampa, Booker T. Washington with Franklin, and Young with Sligh, Memorial or Franklin * * * This modification is granted on the representation by appellees [i.e., the school board] that the stated zone line .changes will result in a student population at Jusl of 567 Negro and 107 white students; 625 Negro and 115 white students in Booker T. Washington; and 1,075 Negro and 159 white students in Young. 427 F. 2d at 878. [Emphasis supplied].

IV

On May 13, 1970, this Court ordered defendants to comply with the Court of Appeals mandate. On June 6,1970, defendants file. a Notice of Compliance, and on June 15, 1970, a Detailed Report of Compliance. In the Report the anticipated attendance figures at the two black high schools were different from those given in the table. The attendance boundaries of Blake had been altered and the contemplated attendance was 650 blacks, 60 whites. At Middleton with the same boundaries as before but under a strict neighborhood assignment system with no variances allowed, 1,020 blacks and 115 whites were expected.

Rather than pairing them, as suggested by the Court of Appeals, defendants elected to redraw attendance zone lines for certain elementary schools. Of the 6 black elementary schools ordered desegregated by the Court of Appeals, 1 was

to be closed (Henderson), 3 were to remain all black (College Hills, Dunbar, Meacham), and 2 were to be over 90% black (Lincoln, Simmons).

On June 19, 1970, this Court ordered defendants to file (a) a plan for pairing Blake with Plant Senior High School and Middleton with Hillsborough Senior High School, (b) a plan for pairing the 6 black elementary schools, and (c) any other plan for modifying atlendance zones at the high school and elementary level. In response the school board filed figures making it obvious that more desegregation would be accomplished at the high school and elementary level by pairing than by rezoning.[29]

Plaintiffs' Proposed Plan of Desegregation was filed July 15, 1970. It used a feeder system as the means for estaklishing attendance at junior and senior high schools, and aimed at desegregating every school in Hillsborough County.

Following a hearing on July 22, 1970, at which testimony was heard and evidence received, the Court entered an order stated in part:

> As directed by the court defendant School Board filed a plan of pairing elementary schools amd filed population figures by race of the aforesaid schools both in its proposed rezoning plan and under a pairing plan. Such comparative figures and other evidence received at hearing clearly establishes and the

---

[29] Defendants' Information Relating to Pairing Certain Schools and Modifying Attendance Zones, filed July 10, 1970.

> court finds that the rezoning plan for elementary schools as proposed by the School Board does not substantially accomplish the same amount of desegregation as would the pairing plan proposed by the School Board at the Court's direction.[30]

Noting that a further rezoning plan or a plan whereby several elementary schools were grouped might accomplish the desired resul.ts, the Court gave the.school board until August 21, 1970, to file a revised rezoning plan for elementary schools.

Defendants' second rezoning plan was filed August 11, 1970, At the close of a hearing conducted on August 13, 1970, the Court ruled from the bench and found that of the three plans submitted by the school board the pairing plan was the most effective and would be approved. The Court required the school board to file additional information relating to recommendations as to the specific grade locations at the paired schools and further details relating to transfer rules and the biracial committee by August 19, 1970.

On August 19, 1970, defendants presented the Court with three separate supplemental plans for the elementary schools concerned, one of which involved the closing of a sckool and distribution of its pupils to three other schools, and each of which had two or more alternative plans attached thereto.

---

[30] Order of August 3, 1970, p. 2.

On August 21, 1970, the Court entered an Interim Order approving various of the plans filed two days before. Henderson was to be closed and its students distributed among Grakan, Lee and Meacham Elementary Schools. The following schools were paired: Carver and Gorrie; College Hill and Edison; Dunbar and Tampa Bay Boulevard; Simmons and Burney; Lincoln and Jackson. The Interim Order also set out the Transfer Rules governing attendance outside assigned schools.

The Interim Order was confirmed and supplemented by a Memorandum and Order entered August 25, 1970.

On August 28, 1970, the school board requested that a change be made in the bodndaries for Blake High School. Preliminary registration of students there indicated that the school would be greatly under capacity when it opened on August 31, 1970. The school board therefore asked the Court to

> zone approximately 290 additional students into Blake High School who are presently residing in the Plant High School district. The race of the students in the proposed change involved is predominantly black, but the exact percentage is not known at the present time.[31]

Following a hearing the Court denied the request without prejudice to its resubmission when more definite fact about enrollment at Blake were known.

---

[31] Defendants' Request for Boundary Change at Blake High School, filed August 28, 1970, p. 2.

Thereafter defendants again requested a boundary change for Blake. On September 10, 1970, they stated, student population at Blake was 428, far below capacity. It was requested that the Court:

> consider a change in the attendance boundaries for Blake High School which will zone into Blake High School approximately 241 additional students who are presently residing in the Plant High Sckool attendance area. The race of the students in the proposed change of boundaries is predominantly black.[32]

The second request was denied.[33] Defendants' suggestion that Blake be repopulated by being further resegregated was rejected for several reasons. At hearing on the second request it had keen shown that of the 428 students in attendance at Blake, 426 were black and 2 were white. It had also been shown that all of the students to be zoned into Blake were black. The proposed boundary change would have qiven Blake the same attendance zone it had at the time this case was reversed in May 1970 with the exception of an additional attendance area, containing no whites.

The Court also noted that in the table submitted to the Court during the limited remand in March 1970 the school bcard had projected an enrollment of 877 blacks, 197 whites at Blake under a neighborhood system; that the Court of

---

[32] Defendants' Second Request for Boundary Change at Blake High School, filed September 11, 1970, p. 2.

[33] Memorandum and Order, filed September 24, 1970.

Appeals had relied on this representation in directing implementation of such a plan at Blake; that in June 1970 the school board had revised its figures and predicted 650 blacks and 60 whites at Blake; and that at present there were 426 blacks and 2 whites there.

SUPERVENING FACTS AND LAW

On November 12, 1970, defendants filed a Report giving the racial composition of certain schools as of October 23, 1970. Analyzed in light of data previously furnished the Court, the Report demonstrates the ineffectiveness of the August 1970 desegregation decrees.

Chart One[34] traces for four school years the student population by race at 21 schools which were black in September 1967. It shows that these schools have remained identifiably black despite Judge Lieb's order of August 1, 1969, despite the Court of Appeals' reversal on May 11, 1970, and despite the undersigned's orders of August 1970. Both of the high schools remain black. Three of the four junior high schools are black.[35] Ten of the 16 elementary

---

[34] See below, pp. i-iv. All of the charts attached to this order are by reference made a part hereof.

[35] Marshall was desegregated under the plan approved August 1, 1969, when it was paired with Tomlin. The school board did not furnish the Court with figures for attendance at Marshall during the 1970-1971 school year.

schools are still black.[36] One has been closed. The remaining 5 are over 50% black.

Chart Two[37] compares the 1969-1970 school year enrollment at 10 black schools directed desegregated in August 1970 with these schools' projected and actual enrollment for the 1970-1971 school year. The figures therein show that both high schools and all three junior high schools are still black. The 5 elementary schools are over 50% black.

The figures also demonstrate that tie school board's representations to this Court and the Court of Appeals were markedly inaccurate. At the high school and junior high school level, there is simply no significant correlation between the enrollment projected by the school board if its plan were adopted and actual enrollment at present. At the elementary school level the percentage of black students at each school is higher than was represented to this Court.

In Chart Three[38] the school board's estimates of school attendance by race at the 5 elementary schools paired with black schools for the 1970-1971 school year .are seen to be highly erroneous. The school board predicted that 3 of the

---

[36] The Court has not been informed what the current attendance figures are for 8 of the black elementary schools: Glover, Jackson Heights, Lomax, Potter, Progress Village, Roland Park, Shore, Williams. Since they were not ordered desegregated, there can be little doubt that these schools are still black.

[37] See below, pp. v-vi.

[38] See below, p. vii.

schools would have more white students than black, but it turned out that 4 were black.

II

In Pate v. Dade County School Board, 434 F.2d 1151 (5 Cir.1970), the Court of Appeals disapproved a desegregation plan for Miami, Florida, under which 22 schools with 44% of the black student population were all black or virtually all black. The Court of Appeals stated that "obstacles" such as "traffic hazards, school capacities, individual school programs, format and curricula, walking distances, natural barriers, and grade levels in each school," 434 F.2d at 1154, could not justify a plan resulting in insubstantial desegregation. Using the techniques of pairing and grouping the Court of Appeals reduced the number of blacks attending black schools from 44% to 24%.

In Brown v. Board of Education of City of Bessemer, 432 F.2d (5 Cir.1970), it was stated:

> The restructuring of the grade system in the proposed pairing is not, by itself, such an indicium of educational unsoundness as to render an otherwise feasible alternative unacceptable. * * * No particular grade structure can be considered inviolate when constitutional rights hang in the balance. 432 F.2d at 23. [Emphasis supplied.]

The Court of Appeals proceeded to desegregate by pairing. The Court also updated the majority to minority

transfer provision "so as to provide priority for space to transferees." 432 F.2d at 24.

In Allen v. Board of Public Instruction of Broward County, 432 F.2d 362 (5 Cir.1970), the Court of Appeals observed:

> In the conversion from dual school systems based on race to unitary school systems, the continued existence of all black or virtually all black schools is unacceptable where reasonable alternatives exist. And it is clear that one acceptable way to achieve reasonable alternatives is by pairing schools. The tenor of our decisions is unmistakable: where all black or virtually all black schools remain under a zoning plan, but it is practicable to desegregate some or all of the black schools by using the tool of pairing, the tool must be used. 432 F.2d at 367.

The Court of Appeals directed the pairing and clustering of 13 black elementary schools, thereby desegregating every one of these schools. The Court then said:

> In ordering the pairings and groupings described above we have not suggested which specific grades should be assigned to which specific schools. Those decisions are left to the district court. * * * However, in deciding which grades will attend which schools, the district court is ordered to comply with the

> following requirements: (1) In every attendance zone created by the pairing and clustering the court must make every reasonable effort to avoid "splitting" a grade, i.e., assigning any particular grads to more than one schocl. (2) If in some instances it does become necessary to split a grade, the court will assign the students in that grade in such a manner that the degree of desegregation ordered by this court for that attendance zone will not be diminished. 432 F.2d at 369.

In Singleton v. Jackson Municipal Separate School District, 432 F2d. 927 a plan was found unacceptable under which "approximately 70% of the Negro elementary students will bs in all (or substantially all) Negro elementary schools." 432 F.2d at 928. In a Supplemental Order the Court of Appeals directed the district court's attention to

> our recent cases in which this court has mandated pairings, clustering, or such other equally effective devices to reduce the number of all black schools (90% or more black) and the percentage and number of blacks in all black schools. 432 F.2d at 931.

In Youngblood v. Board of Public Instruction of Bay County, 430 F.2d 625, 629 (5 Cir.1970), the Court of Appeals noted: "This Court requires school boards to draw zone lines sc as to affirmatively promote desegregation of racially dual school systems."

In a series of opinions the Court of Appeals clarified the attendance system set forth in Ellis v. Board of Public Instruction of Orange County, 423 F.2d 203 (5 Cir.1970). In Ellis the panel held that under the specific facts of the case Orange County, Florida, could desegregate by using a neighborhood school attendance system wherein variances were not allowed to permit children a choice of not attending the nearest schools to their residences and thereby avoiding assignment to a formerly black or formerly white school.

The Court of Appeals noted that a neighborhood school assignment system--that is, a system under which a student must attend the school nearest his home--could be of two types. It might take the form of equidistant assignment. "[Z]one lines would be located equidistant between two schools and all students within the zone would attend a given school without regard to the capacity of the school." 423 F.2d at 207. Or a student might attend the school nearest his home limited only by the capacity of the school; if the school was unable to accommodate him he would attend the next nearest school to his residence. The Court of Appeals adopted the latter plan for Orange County.

It was also held that the neighborhood school assignment system, based on school capacity, must be observed without exception. Variations based on traffic Conditions or zone lines were impermissible.

> Variances by arbitrary zone lines, or for reasons of traffic, while reasonable on their face, may destroy the integrity and the stability of the entire assignment plan. If Orange County wishes to maintain a neighborhood

> assignment system, then it must do so without variances. Each student in the system must be assigned to attend the school nearest his or her home, limited only by the capacity of the school, and then to the next nearest school. 423 F.2d at 208.

An Ellis-type plan was rejected in Henry v. Clarksdale Municipal Separate School District, 433 F.2d 387 (5 Cir.1970), where the plan

> proposed to leave unchanged the totally (or nearly so) segregated elementary school program under the zoning system already disapproved by [previous decisions in the case], but now sought to be restored to acceptability and brought forward under the Ellis neighborhood school or geographical proximity or "equal distance zoning" label. No change with respect to the elementary schools of Clarksdale would occur except the nomenclature employed. The racial makeup of pupils attending the several elementary schools would continue exactly as before. 433 F.2d at 390.

Pairing was ordered to desegregate, and objections thereto raised by the school board were dealt with in these words:

> The objections as to children being required to walk as much as two miles as opposed to an average of 0.5 miles heretofore, and of having to travel natural or man-made

> barriers and the claim that a 2-2-2 grade division is somehow less desirable than a 1-6 division, all fail. * * * Barriers which did not prevent enforced seqregation will not be held to prevent conversion to a full unitary system. 433 F.2d at 394. [Emphasis supplied].

Objections based on lack of "articulation" caused by the breakup of grade composition between two or more schools under zoning or clustering were also overruled.

In Valley v. Rapides Parish School Board, 434 F.2d 144 (5 Cir.1970), the Court of Appeals again rejected an Ellis-type plan on the ground that such a plan did not substantially abolish segregation. Pairing, rezoning, and clustering were ordered. The majority to minority transfer provision was modified to require that transferees be given priority for space.

In Ross v. Eckels, 434 F.2d 1140 (5 Cir.1970), all parties agreed that a desegregation plan which had left 77% of Houston's black students in black schools in December 1969 was defective. The district court thereupon ordered an equidistant zoning plan into effect.

The Court of Appeals modified the district court's plan. A geographical capacity attendance plan was adopted for the secondary schools. At the elementary level the equidistant zoning plan was modified in part so that by the technique of pairing the number of blacks in black schools was reduced from 21,418 to 11,982.

The majority to minority transfer plan was altered so that (a) all transferring students were given transportation, and (b) transferees were given priority for space at any school within the system.[39]

A final Court of Appeals decision of interest is Bradley v. Board of Public Instruction of Pinellas County, 431 F.2d 1377 (5 Cir.1970).[40] Bradley involved a school system in close proximity to the Hillsborough system and of great similarity. Under the plan in effect 64% of the black students attended all black or virtually all black schools. The Court of Appeals versed, and, by use of pairing, grouping, and

---

[39] Other cases dealing with the Ellis-type assignment plan (but decided prior to August 1970) are Lee v. Macon County Board of Education, 429 F.2d 1218 (5 Cir.1970); Hightower v. West, 430 F.2d 430 F.2d 552 (5 Cir.1970): and Andrews v. City of Monroe, 425 F.2d 1017 (5.Cir.1970).

In Andrews a purported Ellis-type plan was rejected because it resulted in 85% of the black elementary school students and 77% of the black high school students being assigned to traditionally black schools which would remain black. The panel said:

> However, we do not reject the School Board's plan solely on the ground that it does not fit the Orange County definition of a 'neighborhood' system. Even if, as presently constituted, the plan were a true neighborhood plan, we would reject it because it fails to establish a unitary system. Orange County does not say what a "neighborhood" system of student assignment per se is a unitary system. 425 F.2d at 97 [Emphasis supplied].

[40] The Bradley case was decided in July 1970, but because of its obvious applicability to the instant case it is discussed here.

rezoning, reduced the percentage of blacks attending black schools from 64% to 14.2%.

Further proceedings in the Bradley case were held at the district level when the school board failed to desegregate the only remaining black high school, Gibbs High School. On March 15, 1971, the school board filed its plan for desegregating the school. The plan called for the dispersion of all Gibbs students among Gibbs and 5 other high schools, with the result that each of these 6 facilities would have student bodies approximately 83% white and 17% black. A map attached to the proposed plan showed that the desegregation was accomplished by gerrymandered zoning and the use of satellite zones.[41]

On April 15, 1971, the district court approved the school board's plan under this condition proposed by the school board. "that the percentage of black students in any St. Petersburg high school, to wit, Boca Ciega, Lakewood, St. Petersburg, Northeast, Dixie Hollin and Gibbs, shall not exceed twenty-two percent (22%) nor be less than twelve percent (12%) and that it is further recognized that the area zone lines for the respective high schools will have to be adjusted from time to time in order to meet the respective required ratio between black and white students.[42]

---

[41] A satellite zone is an area which is not contiguous with the main attendance zone surrounding a school.

[42] Bradley v. Board of Public Instruction of Pinellas County, No. 64-98 Civ. T., Order of April 15, 1971, p. 3.

III

On April 20, 1971, the Supreme Court delivered five opinions which defined with particularity the responsibilities of school authorities and the scope of powers of federal courts in eliminating racially separate public schools established and maintained by state action. Four of these decisions will be discussed here.

In Swann v. Charlotte-Mecklenburg Board of Education, _____U.S. ____, 39 U.S.L.W. 4437 (1971), the district court had dealt with a school system conceitedly not unitary in t969 and with a school board which refused to submit a satisfactory desegregation plan. The district court found that certain of the board's actions were discriminatory; that residential patterns resulted in part from federal, state, and local governmental action; and that the board's actions based on these patterns resulted in segregated education.

The desegregation plan adopted by the district court and affirmed by the Supreme Court proposed assignment of blacks to all ten of the system's high schools. Attendance zones for the high schools were shaped like wedges of a pie, extending outward from the center of the city. The junior high schools were rezoned, and nine "satellite zones" were created. Under the satellite plan, inner city blacks were assigned to 9 outlying predominately white junior high schools. The 76 elementary schools were desegregated by use of zoning, pairing, and grouping; 9 inner city black schools were grouped with 24 white suburban schools. The district court explained the latter aspects of the plan in these words:

> It * * * desegregates all of the rest of the elementary schools by the technique of grouping two or three outlying schools with one inner city school; by transporting black students from grades one through four to the outlying white schools: and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school. Quoted at _____ U.S. at ____, 39 U.S.L.W. at 4440

The Supreme Court determined that the so-called anti-busing provisions of the Civil Rights Act of 1964, see 42 U.S.C. §§ 2000c (b), 2000c-6, do not limit the powers of federal courts to use busing as a mode of accomplishing desegregation. The Court also delineated "the responsibility of local authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the dual system." ____ U.S. at ____, 39 U.S.L.W. at 4443.

> The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system.* * * This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the

> separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns, which when combined with "neighborhood zoning," further lock the school system into a mod of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy. ___ _U.S. at _____, 39 U.S.L.W. at 4443.

Although there is no constitutional right to a particular degree of racial balance, racial quotas have a place, in the task of desegregation. The district court used a 71% white-29% black ratio in each school as a starting point in-the process of shaping a remedy. This was held to be proper because (a) the school authorities had maintained a dual system until at least 1969, and (b) the school board had totally defaulted in its duty to come forward with an acceptable plan of its own.

It was the Supreme Court's view that while the existence of a small number of one-race schools is not a sure mark of a segregated system, in systems with a history of discrimination there is "a presumption against schools that are substantially disproportionate in their racial composition." _ __ U.S. at _____, 39 U.S.L.W. at 4445.

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one

> race, they have the burden of showing that such school assignments are genuinely non-discriminatory. _____U.S. at _____, 39 U.S.L.W. at 4445.

Majority to minority transfer arrangements "must grant the transferring student free transportation and space must be made available in the school to which he desires to move." _____ U.S. at _____, 39 U.S.L.W. at 4445.

The Supreme Court recognized that the remedial altering of attendance zones--including pairing, clustering, grouping, drastic gerrymandering of attendance zones--may be required to effectuate a unitary system.

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the .interim period when remedial adjustments are being made to eliminate the dual school systems. * * *
>
> Desegregation plans cannot be limited to the walk-in school._____U.S. at _____, 39 U.S.L.W. at 4445, 4446.

The district court's "conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system" was found by the Supreme Court to be "supported by the record." _____ U.S. at _____, 39 U.S.L.W. at 4446.

In Davis v. Board of School Commissioners of Mobile County, _____U.S._____, 39 U.S.L.W. 447 (1971), the Supreme Court reviewed a decision of the Court of Appeals for the Fifth Circuit.

The metropolitan area of Mobile County, Alabama, is divided by a major highway. About 94% of the black students in the metropolitan area live on the east side of the highway between it and the Mobile River. The Court of Appeals treated each side of the highway as distinct, without either interlocking zones or transportation across the highway.

The Court of Appeals approved a plan under which 50% of the black elementary students in the metropolitan area were to attend 6 black schools. All 7 secondary schools formerly black were to be desegregated. Enrollment figures for the 1970-1971 school year made available to the Supreme Court showed that the projections on which the Court of Appeals had relied were inaccurate.[43] Under the Court of

---

[43] That the enrollment figures relied upon by the Court of Appeals turned out to be wrong is not the only similarity of the Davis case to the instant one. The panel in Davis consisted of Judges Bell, Ainsworth, and Godbold, who also presided over Mannings III and Ellis. In Davis Judge Bell wrote of the similarities between that case and the present one. See Davis v. Board of School Commissioners of Mobile County, 430 F.2d 883, 886-887

Appeals plan as actually implemented, 64% of the black elementary students in the metropolitan area were concentrated in 9 black school: and over 50%, instead of none, of the black secondary students were attending black schools. The Supreme Court commented:

> As we have held, "neighborhood school zoning,. whether based strictly on home-to-school distance or on "unified geographic zones" is not the only constitutionally permissible remedy: nor is it per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. The measure of any desegregation plan is its effectiveness.
>
> On the record before us, it is clear that the Court of Appeals felt constrained to treat the eastern part of Metropolitan Mobile in isolation from the rest of the school system, and that inadequate consideration was given to the possible use of bus transportation and split

---

(5 Cir.1970).

> zoning. _____ U.S. at _____, 39 U.S.L.W. at 4448 (1971)

The Court of Appeals was therefore reversed.

In North Carolina State Board of Education v. Swarm, _____ U.S. ___, 39 U.S.L.W. 4449 (1971), North Carolina's Anti-busing Law which prohibited assignment of students for the purpose of achieving a racial balance and busing of students for this purpose was held unconstitutional.

> * * *the Constitution does not compel any particular degree of racial balance or m/mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy.
>
> * * *bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it. ___ U.S. at _____, 39 U.S.L.W. at 4449,4450.

McDaniel v. Barresi, _____U.S.____, 39 U.S.L.W. 4450 (1971), involved an attempt by parents to enjoin the Clarke County, Georgia Board of Education's voluntary desegregation plan. Under the plan geographic zones were drawn to achieve a greater racial balance. The students in 5 heavily black pockets either walked or were transported by bus to schools located in white attendance zones. The Supreme Court reversed the Supreme Court of Georgia and

held that neither the equal protection clause of the 14th Amendment nor the Civil Rights Act of 1964 prohibited the board from implementing such a plan.

STATUS OF THE CASE

I

In addition to those heretofore made in this order, the Court makes the following specific findings of fact:

The Hillsborough System is a Segregated System

The Supplemental Findings of Fact, filed March 31, 1970, are authority for the proposition that the defendants' school system is a racially segregated one. As of October 24, 1969, 74% of the county's white students were in 70 white schools, whereas 65% of the black students were concentrated in 21 black schools.

There has been little improvement during the 1970-1971 year. Figures filed by the school board indicate that as of October 23, 1970, 9,106, or 46%,of the system's blacks were attending 15 black schools.[44] Although they comprised only 19% of the student population, 13,606, or 69%, were in

---

[44] The 15 schools are: Glover, Jackson Heights, Lomax, Meacham, Potter, Progress Village, Roland Park, Shore, Williams, Abou, Just, Booker T. Washington, Young, Blake, Middleton. The Court of Appeals expected only 21% of the system's blacks to be in black schools during this school year. Mannings III, 427 F.2d at 878.

28 schools at least 50% black.[45] On the ether hand, 69% of the white students--57,869 out of 83,474-attended 65 schools either all white or at least 95% white.[46]

This Segregation Results from State Action

The racially separate system in Hillsborough County is a consequence of deliberate policy long pursued on defendants' part of separating students solely on account of race.

The State of Florida had constitutional and statutory provisions requiring school segregation on the books until very recently. See, e.g., Art. 12 § 12, Fla. Const. 1885; Section 228.09, Florida Statutes repealed by Chapter 65-239 § 4, Laws of Florida 1965.

Almost ten years ago this Court found as a matter of fact that prior to and after May 17, 1954, defendants operated, maintained and staffed a completely dual school structure. The

---

[45] The 28 schools include, in addition to the 15 mentioned in the previous footnote, Bryan, Burney, Carver, College Hill, Dunbar, Edison (Gorrie, Jackson, Lee, Lincoln, Orange Grove, Simmons, Tampa Bay Blvd.)

[46] All figures relating to current enrollment in Hillsborough County schools may be found in Defendants' Reports, filed December 23, 1969, and November 12, 1970, and in the Supplemental Findings of Fact, filed March 31, 1970. In making its computations the Court has used the December 23, 1969, Report's figures as to the total enrollment by race in Hillsborough County. The Court has also assumed that enrollment at schools not included in the Nov. 12, 1970, Report is the same as it was during the 1969-1970 school year.

school board made no attempt whatever to dismantle the system until September 1961. In the intervening ten years the defendant have at no time taken any steps which have had the effect of significantly altering the system's racially biased student assignment system.

In October 1956 the State Department of Education publish a "School Plant Survey of Hillsborough County Schools 1956." This document filed in evidence on December 5, 1 961, contains an index which lists all of the system's schools as of 1956 under the heading of either "White" or "Negro." Among the schools marked "Negro are Blake, Carver, College Hill, Dunbar, Glover (then having grade 1-9), Lomax, Meacham, Middleton, Simmons, and Booker T. Washington. Of these 10 schools, all at present are 50% black and 6 are at least 90% black.

Of the 79 schools listed as white, 38 are today all white or at least 95% white. Seven of the 79 are now at least 50% black-Burney, Edison, Lee, Orange Grove, Shore, Tampa Bay Boulevard, Ybro.

The Survey also describes future school construction; the new schools are categorized as "White" or "Negro."

The School Board published a "Personnel Directory 1958-1959" in early 1959. It was filed in evidence on December 4, 1961. Again the schools are classified as "White" and "Negro." And again, with a few exceptions, the schools listed as "Negro" are still black, and the schools listed as "White" are still white.

In Defendants' Voluntary Proposal to Amend and Expedite Plan, filed February 3, 1965, Potter and Roland Park are labeled "Predominately Negro."

In their Fourth Supplemental Progress Report, filed October 30, 1965, defendants listed 47 elementary schools, 9 junior high schools, and 4 senior high schools as totally white. At present 40 of these elementary schools, 6 of these junior high schools, and 2 of these senior high schools are either all white or at least white. Among the schools described as attended by blacks only were Carver, College Hill, Potter, Roland Park, Williams, Dunbar, Lomax, Meacham, Progress Village, Blake, Middleton, Just, Booker T. Washington, Young, Glover, Simmons, Lincoln.

Space limitations forbid a more exhaustive review of the file directed to this point. It is sufficient to observe that of the one-race schools in existence 5 and 10 and more years ago, nearly all of the ones still in operation are racially identifiable. Most of the schools that were white then are still white, and most of the black schools remain black. There have been changes in the racial makeup of several schools, but on the whole these have simply been drastic inflows of blacks and outflows of whites resulting in resegregation. Although a minority of the formerly white schools has become black, none of the black schools has become white. Prior Plans Have Failed.

The record in this case, including the information in this order and the charts appended hereto, offers patent and undeniable proof that all of the desegregation plans heretofore implemented in Hillsborough County have failed to abolish the dual structure of student attendance.

The first plan began in 1963, In operation from 1963 until 1967, it provided for integration at the rate of one grade a year and contained a minority to majority transfer provision whereby a white student could avoid attendance at a black school even though the black school was closer to home.[47]

From 1967 until 1969 the system operated under an equally ineffective variety of freedom of choice plan. During the 19691970 school year the school board used the attendance zone system disapproved by Mannings III in May 1970. Under the plan the enrollment figures projected by the school board failed to materialize; the black schools which were to have small numbers of whites had only token white attendance or none at all.

During the 1970-1971 school year the system has functioned. under a plan approved by this Court in August 1970. Once again actual attendance by race has not conformed to what was represented to this Court by defendants. The black secondary schools remain black, and at the paired elementary schools the black enrollment is much higher than expected. Numerous other schools remain identably white or black. The reasons why the previous plans failed are obvious. Too much reliance was placed on free choice, transfer provisions other then majority to minority one have been extremely liberal, and no attempt was made to eliminate the black schools except by the addition of a few whites to the black school population.

---

[47] Minority to majority transfer policies were disapproved in Goss v. Board of Education of Knoxville, 473 U.S. 683 (1963), and Boston v. Rippy, 285 F.2d 43 (5 Cir.1960).

Defendants Desegregate All Predominately Black School

The Hillsborough County School System is [sic] as a res [sic] of defendants unlawful policies. It follows that the school board must eliminate all vestiges of the discriminatory actions, "root and branch." Green v. School Board of New Kent Count [sic] 391 U.S.430, 438 (1968). This obligation remains even assuming that the defendants in good faith have submitted plans which through no fault of their own failed to accomplish desegregation.

It is indisputable that in systems practicing racial discrimination the fundamental law of the land--the Constitution of the United States--requires the disestablishment of schools in which there is a disproportionately high percentage of black students. In view of the history of this case it is the holding of the Court that defendants must desegregate all schools in their school system where at least half the students are black.[48]

There is no evidence of any substantiality in the record supporting the position that segregation in Hillsborough County is attributable in any measurable degree to voluntary patterns or other factors unaffected by school board activity. As indicated earlier, the record makes plain that prior to and since 1954 certain schools in Hillsborough C6unty have been set aside for black students and others for white students.

---

[48] Although there is some language in Mannings II and Mannings III which might be interpreted to indicate that some of the segregation in Hillsborough County is de facto and not de jure, for the reasons that follow the Court finds that all of the predominately black schools in the county must be eliminated.

With exceptions these schools remain racially identifiable. Over the years defendants have submitted numerous plans for desegregation, not one of which has altered the naked fact chat most blacks attend schools which are inordinately black whereas most whites attend schools in which there are no blacks or only minuscule numbers of blacks. The Court has been unable to locate a single instance in the record where defendants took positive steps to end segregation at a black school and thereafter segregation returned fortuitously. Indeed, no serious attempt has ever been made to eliminate the many black schools. Based on experience, the Court concludes that what re-segregation there has been is a consequence of the continued existence of schools identifiable as white or black.

Since defendants have not taken affirmative steps to end their discriminatory student attendance policies, there has not been an end to de jure segregation

The posture of this case has been altered by superseding caselaw. In Davis the Supreme Court reversed the Court of Appeals because insufficient consideration had been given to noncontiguous attendance zones and the use of busing. The similarities of that case involving Mobile County to the instant one have been noted. And in Swann v. Charlotte-Mecklenburg Board of Education the high court fashioned a presumption against one-race schools in school districts with a history of discriminatory practices. The defendant have not met this burden of showing that the present school assignment system is unconnected with their past and present discriminatory actions.

Supervening facts have also affected the .status of the case as in Davis the facts upon which the Court of Appeals relied in instituting its plan have proved to be erroneous. The 5 secondary schools directed desegregated remain black. The percentage of blacks at the paired elementary schools is higher than was represented to the Court at the time pairing was directed and the Court knows, based on its experience in this and other school cases,[49] that the percentage will increase until the schools become all black unless remedial action is taken.

Stated differently, the record supports what the Court has learned in presiding over school desegregation proceedings in this area of Florida: & desegregation plan will be unsuccessful and entails desegregation where a few whites are added to formerly black schools which otherwise remain intact; in short, a plan which anticipates retention of identifiably black schools will fail. Partial desegregation results in white flight, resort to private schools, and other maneuverings which frustrate the course of justice. Successful desegregation must extend throughout the school system and be done in such a way that the tactics which impede court orders are rendered futile.

There is an old equitable maxim that equity delights to do justice, and not by halves. It never had greater application than here. The Court therefore concludes that in order to

---

[49] The undersigned has presided over these desegregation cases: Blalock v. Board of Public Instruction of Lee County, No. 64-168, Civ. T.; Harvest v. Board of Public Instruction of Manatee County, No. 65-12 Civ. T.; Mays v. Board of Public Instruction of Sarasota County, No. 4242 Civ. T.

desegregate the Hillsborough County School System all of the identifiably black schools must lose that identity.[50]

II

The applicable legal principles merit reiteration.

Desegregation is an Affirmative Duty of a School Board

Initially it is the duty, not of the Court, not of the plaintiffs, but of the school board acting affirmatively and positively to end segregation in Hillsborough County. The duty is not fulfilled submission of plans which fail to work. Hall v. St. Helena Parish Sch Board, 417 F.2d 801 (5 Cir.1969); United States v. Board of Education of Bessemer, 396 F.2d 44 (5 Cir.1968).

In the past defendants have considered the matter of opposing and appealing orders of the Court in school desegregation matters sufficiently important to supplement the board's legal staff with special attorneys. As this Court noted in its order of August 25, 1970:

> The many factors involved in operating a large school system and the need for long-range plans to guide in site selection, recruitment and placement of teachers, logistics and other things all suggest the

---

[50] Thus there is no real conflict between this order and any previous findings in this case. To the extent that any such conflicts are argued it is the view of the Court that it is bound by superseding facts and caselaw.

> desirability of a good comprehensive plan. The record does not indicate that the Board ever made use of the desegregation aids available to it upon request from the various state and federal agencies, or of the expertise in desegregation technique, acquired by counsel for plaintiffs after participating in many desegregation cases.

The board has never employed special consultants .to assist the administrative staff of the board. With the help of the district court there the board in Mecklenburg County, North Carolina recognize such a need and the Supreme Court approved the procedure of the employment of an expert as a consultant. Swarm v. Charlotte-Mecklenburg Board of Education, supra.

As noted, this Court has jurisdiction over school desegregation action in the nearby counties of Manatee, Sarasota and Lee and is by virtue of residency therein and of common knowledge aware of the steps being taken in Pinellas County, the plan for which was ordered by a fellow judge of this Court.

Like Hillsborough, these counties are all on the west coast of Florida and the school problems in each have much in common. Pinellas County, just across the bay has the most similar problems. Each of said counties has accomplished a degree of desegregation in its schools which far exceeds that in Hillsborough. To a considerable extent, and with minor exceptions this results from a difference in attitude expressed and action taken by school boards, school administrative and legal staffs, local newspapers, civic organizations and county

and municipal leaders. For example, shortly after this court's order directing pairing of certain schools, a news story in a local newspaper quoted the Mayor of Tampa as saying that he would transfer his children to a private school and recently a civic club in Tampa publicly commended the Superintendent of Schools and the school board for outstanding service, not directly as a result of, but after notice of the extent of segregation in local schools and the Supreme Court decision in Swan.

The position expressed by counsel for defendants at one of the 1970 hearings that the Constitution does not require integration but only forbids segregation has long been rejected. United States v. Jefferson Board of Education, 372 F.2d 836 (5 Cir. 1966), aff.en banc 380 F.2d 385 (1967).

Desegregation Must Be Accomplished Now

The time for deliberate speed is over, Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964); that doctrine has been sent "to its final resting place." Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211, 1216 (5 Cir. 1969). It is the obligation of school boards to terminate their dual systems "at once." Alexander v. Holmes County Board of Education, 396 U.S.19, 20 (1969).

By reason of the foregoing, it is

ORDERED, ADJUDGED AND DECREED:

1. No later than June 15, 1971, the school board shall file with the Court and serve upon plaintiffs a plan or plans for desegregating the Hillsborough County School

System in accordance with this order, said plan to become effective with the beginning of the 1971-1972 school year.

2. In formulating the plan, the school board shall follow these guidelines:

(a) The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.

(b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

(c) The plan shall accomplish desegregation by pairing, grouping, clustering, and use of satellite attendance zones. Where pairing, grouping, and clustering are used, every effort shall be made to avoid splitting of grades. If in some instances it becomes necessary to split a grade the school board shall file figures showing the extent of desegregation which would result if the grades were not split. No splitting of grades will be approved unless it results in a degree of desegregation equal to that which would result if the grades were not

split. In view of what has gone on before, any proposed desegregation by use of rezoning or gerrymandered zoning shall be supplemental, secondary, and alternative to desegregation by the techniques mentioned earlier in this sub-paragraph (c) and shall not be in lieu thereof. (d) In formulating the plan the school board should consult with experts and authorities in the field of desegregation who are unaffiliated with the Hillsborough County School System. (e) In formulating the plan the school board shall examine and consider the plans used and in effect in Manatee, Sarasota, Lee and Pinellas Counties and should consult with school officials in those counties. The Clerk of the Court is directed to make the files in these cases available to defendants.

3. On May 21, 1971, May 28, 1971, and June 4, 1971, the school board shall file with the Court status reports detailing its steps taken in complying with this order.

4. As noted, the location of new school sites is a matter directly affecting existing segregation in schools. If the board requires court consideration of new school site locations or purchases it may submit a request for the same at any time.

5. Should the school board again default on its obligation to present a legally acceptable plan the Court will direct its attention to the provisions of plaintiffs' proposed plan of July 15, 1970. The Court will also then determine whether to appoint at defendants' expense an expert or experts

in the field of education for the purpose of obtaining a satisfactory desegregation plan.

6. Copies of this order will be sent to each of Present members of the school board, as well as the superintendent of schools.

7. Jurisdiction is retained.

DONE and ORDERED at Tampa, Florida, this 11th day of May, 1971.

/s/_____
Ben Krentzman
UNITED STATES DISTRICT JUDGE

[FOLD-OUT]

CHART ONE
STUDENT POPULATION BY RACE
AT SELECTED HILLSBOROUGH
COUNTY SCHOOLS

CHART ONE

STUDENT POPULATION BY RACE AT SELECTED HILLSBOROUGH COUNTY SCHOOLS

1967-1970

A. SENIOR HIGH SCHOOLS

SCHOOL	1967-68 School Yr. as of 9-15-67.[1]		1968-69 School Yr. as of 9-17-68.[2]		1969-70 School Yr. as of 10-24-69.[3]		1970-71 School Yr. as of 10-23-70.[4]	
	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE
BLAKE	1122	0	855	0	877	0	526	0
MIDDLE-TON	1021	0	1029	0	1010	3	1028	5

[1]See Defendants' Report, filed September 20, 1967.
[2]See Defendants' Report, filed September 25, 1968.
[3]See Defendants' Report, filed December 23, 1969.
[4]See Defendants' Report, filed November 12, 1970.

BEST AVAILABLE COPY

[FOLD-OUT]

CHART ONE
STUDENT POPULATION BY RACE
AT SELECTED HILLSBOROUGH
COUNTY SCHOOLS
continued

CHART ONE (CONT.)

B. JUNIOR HIGH SCHOOLS

SCHOOL	1967-68 School Yr. as of 9-15-67.		1968-69 School Yr. as of 9-17-68.		1969-70 School Yr. as of 10-24-69.		1970-71 School Yr. as of 10-23-70.	
	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE
JUST	463	0	662	0	592	3	535	9
BOOKER T. WASHINGTON	683	0	612	0	624	0	591	49
YOUNG	1208	0	1174	0	1144	0	1142	59
MARSHALL[5]	648	0	666	0	126	429		

[5]Marshall was a combination junior-senior high school containing grades 7 through 12 until June 1969. Beginning with the school year 1969-1970 it was paired with Tomlin Junior High School and limited to the 7th grade. See defendants' plan filed August 1, 1969.

[FOLD-OUT]

CHART ONE
STUDENT POPULATION BY RACE
AT SELECTED HILLSBOROUGH
COUNTY SCHOOLS
continued

CHART ONE (CONT.)

C. ELEMENTARY SCHOOLS

SCHOOL	1967-68 School Yr. as of 9-15-67. BLACK	WHITE	1968-69 School Yr. as of 9-17-68. BLACK	WHITE	1969-70 School Yr. as of 10-24-69. BLACK	WHITE	1970-71 School Yr. as of 10-23-70. BLACK	WHITE
CARVER	645	0	645	0	[illegible]	0	339	156
DUNBAR	729	0	773	0		0	440	76
GLOVER	248	0	241	0	[illegible]	0		
JACKSON HEIGHTS	379	146	488	78	[illegible]	43		
LINCOLN	502	0	508	0	[illegible]	0	369	132
LOMAX	593	0	619	0	[illegible]	0		
MEACHAM	681	0	513	0	[illegible]	0	706	7
POTTER	761	0	783	1	[illegible]	0		
PROGRESS VILLAGE	517	0	460	0	543	58		
ROLAND PARK	340	0	322	0	367	6		
SHORE	384	0	318	0	365	0		
SIMMONS	205	0	189	0	233	0	174	136
WILLIAMS	621	12	612	19	665	20		
YBOR	385	10	372	6	363	7		

[FOLD-OUT]

CHART ONE
STUDENT POPULATION BY RACE
AT SELECTED HILLSBOROUGH
COUNTY SCHOOLS
continued

CHART ONE (CONT.)

C. ELEMENTARY SCHOOLS

SCHOOL	1967-68 School Yr. as of 9-15-67. BLACK	WHITE	1968-69 School Yr. as of 9-17-68. BLACK	WHITE	1969-70 School Yr. as of 10-24-69. BLACK	WHITE	1970-71 School Yr. as of 10-23-70. BLACK	WHITE
COLLEGE HILL	860	0	921	0	998	2	534	119
HENDERSON	441	1	366	2	394	0	CLOSED	

[FOLD-OUT]

CHART TWO
STUDENT POPULATION BY RACE
AT SCHOOLS DESEGREGATED
IN AUGUST 1970

CHART TWO

STUDENT POPULATION BY RACE AT SCHOOLS ORDERED DESEGREGATED IN AUGUST 1970

SCHOOL	1969-70 School Yr. as of 10-24-69.[1]		Projected enrollment 1970-71 School Yr. as represented to Court by school bd.[2]		Actual enrollment 1970-71 School Yr. as of 10-23-70.[3]	
	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE
BLAKE	877	0	877	197	526	0
MIDDLETON	1010	6	1010	250	1028	5
JUST	592	3	567	107	535	9
BOOKER T.	624	0	625	115	591	49
YOUNG	1144	0	1075	159	1142	59
CARVER	721	0	367	287	339	156
COLLEGE HILL	998	2	667	201	534	119
DUNBAR	661	0	329	325	440	76
LINCOLN	575	0	272	147	369	132
SIMMONS	233	0	66	102	174	136

N.B. Henderson Elementary, ordered desegregated by the Court of Appeals, was closed in June 1970. Its students were distributed among Graham, Lee, and Meacham. At the school board's request this Court did not pair Meacham Elementary, although it was ordered desegregated by the Court of Appeals.

[1] See Defendants's Report, filed December 23, 1969.

[2] See Chart attached to Supplemental Findings of Fact, filed March 31, 1970, and submitted by the school board; see also Defendants' Information Relating to Pairing Certain Schools,

BEST AVAILABLE COPY

[FOLD-OUT]

CHART TWO
STUDENT POPULATION BY RACE
AT SCHOOLS DESEGREGATED
IN AUGUST 1970
continued

CHART TWO (CONT.)

1970-1971 school year population at Blake would be 650 blacks, 60 whites, and at Middleton would be 1020 blacks, 115 whites.

[3] See Defendants' Report, filed November 12, 1970.

[FOLD-OUT]

CHART THREE
SCHOOL POPULATION BY RACE
AT SCHOOLS ORDERED PAIRED WITH BLACK
SCHOOL IN AUGUST 1970

CHART THREE

SCHOOL POPULATION BY RACE AT SCHOOLS ORDERED PAIRED WITH BLACK SCHOOLS IN AUGUST 1970

SCHOOL	1969-70 School Yr. as of 10-24-69.[1]		Projected enrollment 1970-71 School Yr. as represented to Court by school board.[2]		Actual enrollment 1970-71 School Yr. as represented to Court by school bd.[3]	
	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE
JACKSON	2	454	225	305	269	259
GORRIE	78	557	374	264	182	436
BURNEY	72	215	138	194	108	69
EDISON	39	456	323	237	254	168
TAMPA BAY BLVD.	4	690	278	345	304	223

[1]See Defendants' Report, filed December 23, 1969.
[2]See Defendants' Information Relating to Pairing Certain Schools, filed August 19, 1970.
[3]See Defendants' Report, filed November 12, 1970.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

No. 3554 Civ. T.
[Filed July 6, 1971]

ANDREW L. MANNING, et al, Plaintiffs,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF HILLSBOROUGH COUNTY, FLORIDA, et al, Defendants.

OPINION AND ORDER

On May 11, 1971, this Court entered an Opinion and Order which among other things directed defendants to file a comprehensive plan, or plans, for desegregating the Hillsborough County School system effective with the beginning of the 1971-1972 school year. The findings and conclusions in said order are by reference made a part hereof.

Hearing was noticed for June 24, 1971, and on June 3, 1971, the Court entered an order outlining the procedure to be followed thereat.

The defendants filed the status reports and a plan as directed.

On May 18, 1971, plaintiffs filed a motion requesting that any order of desegregation to be entered contain faculty desegregation and policies and general reporting provisions as set out therein and that the Court retain jurisdiction. Plaintiffs did not file a written plan of desegregation or written objections to the plan filed by the school board. They offered verbal objections at the evidentiary hearing but no fact witnesses or evidence as such. At hearing defendants requested permission to file a responsive memorandum to plaintiffs' motion. Plaintiffs indicated that no further memoranda would be filed. Defendants' responsive memorandum will be separately discussed hereafter.

THE HEARING

The procedure at hearing followed that prescribed in the Court's order of June 3, 1971. The plans, maps, etc. filed by the board fully complied with the Court's order of May 11th and June 3rd as to form. At hearing they were clearly and completely explained and demonstrated through testimony with the use of visual aids and maps. Plaintiffs cross-examined defendants witnesses. As indicated plaintiffs offered no written plan or evidence. A full hearing was accorded all parties and thereafter those present as spectators who wished to be heard were heard. The hearing was of course attended and reported by the official court reporter.

BRIEF DESCRIPTION OF SCHOOL BOARD PLAN

Separate plans are offered for desegregation of elementary junior high and senior high schools.

Elementary School Desegregation Plan

There are eighty-nine elementary schools in Hillsborough County. Under the plan offered by the school board seventy seven of these schools are effectively integrated through utilization of seventeen clustering arrangements. In each arrangement one formerly predominately black elementary school is clustered with from two to five formerly predominately white elementary schools. The black elementary school becomes a sixth grade center, and all sixth graders from the black school and each of the white schools attend this sixth grade center. First through fifth graders in the black school are distributed among the white schools through the use of satellite zones which cover the boundaries of the black school. First through fifth graders who reside within the boundaries of the white school continue in attendance at the school previously attended.

Graham and Gorrie elementary schools are effectively integrated through rezoning. All first through sixth graders who reside within the new boundaries of each school would attend that school.

Tinker elementary school is effectively integrated through utilization of satellite zoning from the boundary formerly encompassed by Abou elementary school, which under the school--board's proposed plan will be closed.

Four elementary schools within the system were effectiuel integrated during the 1970-1971 school year by rezoning. These are West Shore, Sulphur Springs, Thonotosassa and Wimauma elementar schools, each of which is for first through sixth grades. Under the plan proposed by the school board, no change would be made in the boundaries of these schools.

The plan proposed by the school board calls for the closing of only one elementary school. This is formerly predominatt black Ybor elementary school. In support of closing this school, the school board has presented evidence to show that this school plant is not adequate to serve as an elementary school.

The defendants' plan for elementary schools is fully described in defendants' Exhibit 6-A, which was received in evidence is a part of the record and is incorporated herein by reference.

Junior High Schools

There are twenty-three junior high schools and three junior-senior high schools. Under the plan offered by the school board these schools are effectively integrated through utilization of clustering and satellite zoning arrangements. There are eight cluster arrangements proposed in the school board plan. in each arrangement one formerly predominately black junior high school is clustered with from one to three formerly predominately white junior high schools. The black junior high school becomes a seventh grade center, and all seventh graders from the black school and each of the white schools attend this seventh grade center Eighth and ninth graders from the black Junior high school are distributed

among the white junior high schools through the use of satellite zones which cover the boundaries of the black school. Eighth and ninth graders who reside within the boundaries of the white school continue in attendance at the school previously attended.

No junior high schools are closed under the plan proposed by the school board. Memorial Junior High School would use the facilities formerly utilized by Middleton High School which is to be closed.

The defendants' plan for junior high schools is fully described in defendants' Exhibit 7-B, which was received in evidence, is a part of the record and is incorporated herein by reference.

Senior High Schools

There are at present fourteen senior high schools in Hillsborough County, including three junior-senior high schools. Under the plan offered by the school board, the formerly black high school, Blake, would no longer exist and formerly black Middleton High School would be relocated and merged with Hillsborough High School. The facilities of these former high schools would be utilized in conjunction with the proposed plan for integration of junior high schools, described supra. The attendance area formerly served by Blake is divided among a new high school, which is not yet completed, and Plant and Robinson high schools. The new high school designated "High School C", will be housed until it is completed at Leto High School, and will be the afternoon session at Leto. Satellite zones are utilized to increase the percentage of blacks at Plant and Robinson.

The location for new High School C has been approved by the school boards the appropriate zoning board and this court. The money for its construction is available and construction is expected to begin in the near future.

Middleton High School is merged with Hillsborough High School, and the resulting amalgamation has been designated"Hillsborough-Middleton". Hillsborough-Middleton will utilize the Memorial Junior High School facility, which is located adjacept to what is now Hillsborough High School. As has been stated, the old Middleton facility will become Memorial Junior High School. Portions of the attendance zone formerly served by Middleton High School will be divided into satellite attendance zones for Leto, Chamberlain and Brandon High Schools. The percentage of blacks in attendance at King High School will be increased through a zoning change.

The County's rural high schools are effectively integrated under the school board's plan through utilization of rezoning and satellite zoning techniques. These schools are East Bay, Pinecrest, Plant city, and Turkey Creek high schools. One other high school, Tampa Bay Technical High School, has no precise boundaries, is presently effectively integrated and would be so maintained.

The defendants' plan for senior high schools is fully described in defendants' Exhibit 8-B, which was received in evidence, is a part of the record and is incorporated herein by reference.

PLAINTIFFS' OBJECTIONS

At hearing the plaintiffs did not question the effectiveness of the plan in desegregating the school system, but objected in part to the way it would be accomplished, and contended that it would place an undue and discriminatory burden of desegregation upon black pupils for the following reasons:

1. That proportionately more black students will be bussed than white students as a result of the utilization of sixth and seventh grade centers and their location primarily at formerly predominately black schools.

2. That as a result of the closing of Abou Elementary School and Blake High School and the relocation and merging of Middleton with Hillsborough High School, the formerly predominately black Abou Elementary School and Blake and Middleton High Schools will lose their identity as "community" schools.

Implementation of the plan probably will result in proportionately more black students being bussed than white students. It certainly will result in the bussing of less students over all. If each of the elementary schools retained its character as grades one through six and each of the junior high schools retained its character as grades 7, 8 and 9, satellite zones would have to be utilized in order to bring

whites into the formerly black schools. This would provide an invitation to either "white flight" or "black flight", or both.

The evidence indicates that the site and facilities at Abou Elementary School are substandard. This school should have closed some time ago and the discretion of the school board in doing so at this time should not be disturbed. Testimony indicates that most of the system's high schools are built to serve a capacity of from about 2,000 to 2,500 students. The capacity of Blake High School is less than 1,000 and that at Middleton High School is 1,100. The defendants urge that Middleton was originally reconstructed to serve as a junior high school and that its facilities are only barely adequate to serve as a high school. Testimony indicates that the facilities at Middleton must ultimately be used to house a junior high school and that now is the best time to make the transition, particularly where it is an integral part of desegregating the entire school system. The Court's order of May 11, 1971, outlines previous attempts to desegregate Blake High School. The suggestion that the two high schools should remain as "community" schools has been considered. The Supreme Court has indicated that this is not a criteria to be considered in accomplishing school desegregation. The school buildings themselves will continue where they are and to the extent that they have been previously available for non-school uses will continue to be so available. Upon consideration of the over-all plan, the size and content of the prospective school sites and facilities, and the part the proposed action of the school board will contribute to the success of the desegregation plan, the Court finds that the school board has acted in good faith in proposing the closing or re-location of the named schools and that such action would be a reasonable part of a workable plan of desegregation. The

Court further finds that the implementation of the plan would not constitute invidious discrimination as proscribed by the Fourteenth Amendment.

PLAINTIFFS' MOTION

In Mannings v. Board of Public Instruction of Hillsborough County, Florida, Fifth Circuit 1970, 427 F.2d 874 at 876, the Court said:

FACULTY AND STAFF

> The faculty and staff desegregation standard enunciated in Singleton v. Jackson, supra, requires assignment on a basis whereunder the ratio of Negro to white teachers and staff members in each school is substantially the same as each such ratio is to teachers and staff in the entire school system.
>
> The Hillsborough County school system does not now meet this standard but has moved in large measure in that direction. The faculty ratio of the system is 82 per cent white and 18 per cent Negro. The present faculty ratio in schools having white student bodies is 90 per cent white and 10 per cent Negro. The faculty ratio in schools having Negro student bodies is presently 50 per cent white - 50 per cent Negro. The plan of the system is to go to the Singleton racial ratio in each school beginning with the next school term. The district court is

> directed to require that this be accomplished not later than June 6, 1970."

In its order of August 25, 1970, this Court ordered:

> "3. Principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. Such personnel shall be assigned so that the ratio of black to white teachers in each school, and ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system."

In their motion dated May 18, 1971, plaintiffs do not suggest that this requirement has not been met, but request a continuation of this requirement, together with detailed procedure to be followed by the school board in constitutionally effectuating the requirement from time to time.

In its reply memorandum defendants represent that faculty desegregation was accomplished at every school location in the 1970 school year and that it knows of no complaints regarding discriminatory practice in the effectuation thereof. This Court has not found or held to the contrary. It will continue the requirement for faculty desegregation but finds no basis for the procedural requirements suggested by plaintiffs in advance of the need therefore.

In its order of August 25, 1970, this Court required the filing of a status report on November 16, 1970. Plaintiffs now suggest that reports be filed on August 15th and March 15th, each report setting forth detailed information as contained in Annex B to this motion. The defendants suggest one annual report as of April 30th covering both teacher and pupil ratios.

The Court will retain jurisdiction of this cause and will require the status report to be filed on or before November 17, 1971. If the need for further reports are thereafter suggested or indicated they will be required.

To the extent not otherwise granted in part, plaintiffs motion is denied.

MAJORITY TO MINORITY TRANSFER

OTHER TRANSFER RULES

BI-RACIAL COMMITTEE

APPROVAL OF SITE LOCATIONS

Each of these has been required by previous orders of this Court. Some of them may not be required if the board's plan is effectuated and accomplished.

In its responsive memorandum of June 28, 1971, the defendants say:

> "(a). Should the Desegregation Plan submitted by Defendants to the Court be

> approved, there would seem no purpose for retaining the majority to minority provisions for transfer, since such plan should result in a black to white ratio of approximately 20% to 80% in each and every school; accordingly, and of necessity, black students would be in a minority in schools at all levels....."

The Court is retaining jurisdiction and will require the continuation of all of these procedures to be available and used as necessary.

THE SUFFICIENCY OF THE PLAN

The Court finds that the plan fully complies with the Court's order of May 11, 1971, and the law and will result in the establishment of a unitary school system in Hillsborough County, Florida.

THE CONTINUING RESPONSIBILITY

The record reflects the procedure followed by the defendants in developing the plan. At hearing the Court commended the defendants, their staff and attorneys for this procedure. It involved the entire community and with the cooperation of the press, the public was fully informed from time to time of the reasons for and diligence of all concerned. Without agreeing as to the desirability of the Court's order the defendants followed it as being the law. For the record the Court repeats its appreciation and commendation.

As has been emphasized in previous orders, the school board has a continuing responsibility. The defendants

represent that the plan can and will be effectuated. The Court will require that this be done. To do so will require the same type of community involvement, diligence and effectiveness as has been recently shown.

Upon consideration of the evidence received, the suggestion and arguments of counsel, the cited cases, and independent research of the Court, it is:

ORDERED:

1. The comprehensive plan for desegregation of the Hillsborough County school system effective with the beginning of the 1971-1972 school year as embodied in defendants' Exhibits 6-A, 7-B and 8-B, received in evidence in this case, is approved and defendants are directed to implement the same.

2. As previously ordered the transportation system of the Hillsborough County School system, all facilities of the school and all extra-curricular activities shall be completely re-examined regularly by the superintendent, his staff, and the Board. Bus routes and the assignment of students to buses will be designed, to assure the transportation of all eligible students on a non-segregated and otherwise non-discriminatory basis and all facilities of the system and extra-curricular activities of the students therein shall be so maintained and operated.

3. Principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicafe that a school is intended for black students or white students. Such personnel shall be assigned so that the ratio of black to white teachers in each school, and ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

4. As previously ordered all school construction, school consolidation and site selection, (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure.

5. On or before August 2, 1971, a Bi-Racial Advisory Committee shall be constituted and thereafter shall operate in accordance with the provisions of Exhibit I hereto attached and by reference made a part hereof. This order supersedes all previous or orders relating to a Bi-Racial Advisory Committee.

6. In effecting transfers of students during the operation of the plan the school board shall follow the rules and procedure set out in Exhibit 2 attached hereto and by reference made a part hereof.

7. The board is directed to file and serve on or before November 17, 1971, a report indicating the status of school and faculty population by race in each of the schools of Hillsborough County, Florida, as of a date to be selected by the board, which is between October 15, 1971, and the date the report is filed.

8. Jurisdiction is retained in this cause for such further action as may be necessary and required.

DONE and ORDERED at Tampa, Florida, this 2nd day of July, 1971.

/s/_____
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

Exhibit I

HILLSBOROUGH COUNTY, FLORIDA

SCHOOL BI-RACIAL ADVISORY COMMITTEE

A. Purpose - To serve in an advisory capacity to the School Board in the areas of the operation of transfer rules including majority to minority transfers, the maintenance of zone lines, pairing and grouping problems and in consideration of location of future school site locations; to provide a means for direct access and communication with the school administration, and ultimately with the School Board of Hillsborough County.

B. Structure - This Bi-Racial Advisory Committee will consist of ten members who shall be residents of Hillsborough County, Florida. Five members will be selected by the School Board of Hillsborough County, Florida, with three of the five members being white and two members black. Five members will be selected by the attorneys of record for the plaintiffs in this action. Of these five appointments, three will be black and two white. The net results will be a ten-member committee with equal racial representation. Each member will serve for a one-year term. A member may be re-appointed. The Chairman of the Committee will be selected by the committee itself with the chairmanship

alternating each year between a black and a white chairman. One or more members of the school administrative staff wil be assigned to assist the committee.

Exhibit 2

TRANSFER RULE
HILLSBOROUGH. COUNTY SCHOOLS

EFFECTIVE 1971-1972 SCHOOL YEAR

No student will be allowed to transfer from his or her assigned school except as follows:

1. Majority to minority transfer - Any student shall be permitted to transfer from a school in which his race is in the majority in order to attend the closest school to his residence in which his race is in the minority.

Said transfer shall be permitted at the beginning of each semester.

If a child is entering the Ninth or higher grade, or if the child is sixteen years or older, he may make a choice himself. Otherwise, a parent or other adult serving as a parent must sign the transfer form.

The transfer forms shall be available at each public school in Hillsborough County and the County School offices.

The transfer form shall be completed at least fourteen (14) days prior to the beginning of the semester.

A choice of transfer once granted cannot be changed within the semester.

The transferee is to be given priority for space and thus the transfer is not to be dependent on space being available.

Transportation will be provided by the School Board in service or in kind to the school to which the transfer is made if that school is more than two miles from the home.

2. Transfers may be granted when recommended by the Juvenile Court.

3.Transfers may be granted for children who are exceptional children as defined by State Law or regulation.

4. Children of teachers and certified instructional staff members who reside in Hillsborough County may attend the school wherein their parents are employed.

5. Transfers may be granted students attending Tampa Bay Vocational-Technical High School to the capacity of the building.

6. Transfers may be allowed in cases of severe hardship after determination of each case by the Board.

Transfers under 3, 5 and 6 will be approved by the board only after consideration of recommendations from the school Bi-Racial Advisory Committee. They shall be considered without regard to race except that special attention will be given to insure that transfers are not approved which are made for the purpose of avoiding desegregation. Transfers under 1 and 4 above shall be reported to the school Bi-Racial Committee for its information.

APPENDIX 4

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

[Filed October 14, 1991] ????

CASE NO. 71-3554-CIV-T-17

ANDREW L. MANNINGS, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly BOARD OF PUBLIC INSTRUCTION OF HILLSBOROUGH COUNTY, FLORIDA), et al.,	)
Defendants.	)
	)

CONSENT ORDER

The parties, by their undersigned counsel, have agreed to the entry of this Order modifying the prior Orders of this Court concerning the desegregation plan for the public schools of Hillsborough County. The provisions of this Consent Order result from the school district's comprehensive study of the educational advantages of reorganizing its grade structure to

establish "middle schools" serving grades 6-8, and the School Board's conclusion, following that study, that implementation of the middle school grade structure is desirable. Because this change affects not only the curriculum and staffing of school facilities but also patterns of student attendance, it necessarily requires modification of the Court's Orders in this action. For that reason, the school district's administrative staff has had extensive discussions with counsel for plaintiffs in this action to ensure, if possible, that plans for the implementation of the middle school concept were formulated in a manner that addressed the interests and concerns of the plaintiff class of schoolchildren and their parents in this action. The provisions of this Consent Order and the attachment hereto, resulting from that process, have been approved by the School Board and are supported by both parties. Counsel for the parties have represented to the Court that in their opinion, the modifications set forth in this Agreed Order meet applicable constitutional standards and will continue the progress of the Hillsborough County public schools toward a unitary system from which all vestiges of past discrimination have been eliminated.

The Report of the Middle School Task Force adopted by the School Board of Hillsborough County on July 23, 1991 is appended hereto as Exhibit "1" and is incorporated into this Order. The Task Force Report includes (as Appendix 1) proposed modifications (projected to be implemented over a seven-year period) of grade organization and student assignments in the Hillsborough County school system to accommodate the establishment of middle schools.

Because a fundamental mechanism for desegregation established in the Board's plan approved by this Court's July

2, 1971 Order has been the operation of single-grade or two-grade school centers in predominantly black neighborhoods of Hillsborough County, the creation -- on a uniform basis throughout the district -- of three-grade middle schools and four-year high schools necessarily requires this Court's approval before initial implementation can occur. It is the parties' purpose, in submitting this Consent Order, to permit the phased implementation process to commence.

At the same time, the parties recognize that the specific student attendance proposals contained in Appendix 1 to the Task Force Report are based upon projections and are subject to appropriate modification prior to actual implementation, in order to take account of intervening demographic or other changes and in order to carry out the explicitly articulated goals of the program.* As the Task Force Report states (at p. 26):

> Based on current information, plans through 1995-1996. can be formulated with some degree of assurance. Planning beyond that timeframe must be viewed as tentative because more information is needed to make accurate predictions. It is anticipated that installation of the GEO system purchased for the school system will be of great assistance in the analysis needed to fully develop the following long-range plan.

---

* The Middle School Task Force was charged with the development of a plan that would "retain a desegregated school system" (Task Force Report, at p. 8 ¶ 1.1.

Therefore, the parties have proposed to submit to the Court, no later than April 15 of each year, a report on progress made in implementing the long-range plan contained in the Task Force Report, as well as a specific listing of student attendance changes to become effective in the following school year and new construction (not previously approved) to be undertaken, subject to the Court's approval.

Further, the student assignment and other changes recommended in the Task Force Report will require the development and application of specific operational policies and procedures, for example for the purpose of implementing admissions to magnet schools and programs in a manner that assures the desegregated status of the system (see Task Force Report, at p. 19 § 2.2.2.6; p. 21 § 2.2.3.6). The parties agree that the necessary planning and development of these policies and procedures must be completed prior to the initial implementation of modifications to the Court's prior Orders in this case. The parties expect this work to be completed during the 1991-92 school year (see Task Force Report, at p. 27) and they will report to the Court on such matters no later than April 15, 1992 and request approval of the specific policies or procedures that are proposed to be implemented.

The Court, upon due consideration of the parties' submission and of the entire record herein, concludes that the long-range plan incorporated in the Middle School Task Force Report (Exhibit "1" hereto) should be approved in concept so that initial implementation may commence. It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. The Middle School Task Force Report appended hereto as Exhibit "1," including the projected modifications of

student assignment proposed in Appendix 1 of that Report and in the Magnet Schools Proposal which is Appendix 4 of that Report, is hereby approved in principle and in concept, and the School Board of Hillsborough County is authorized to continue the planning necessary to implement the proposal over the seven-year period suggested by the Report (at pp. 27-29).

2. The parties shall confer periodically during the period of implementing the middle school proposal and Task Force Report for the purpose of reaching agreement on specific implementation steps. Such discussions shall take place at appropriate times and with adequate frequency to facilitate the prompt and timely resolution of any insoluble differences of position by the Court, as well as the smooth and orderly implementation of the middle school proposal. The parties shall annually report in writing (jointly or, if necessary under the circumstances, separately) to the Court no later than April 15 the progress made in implementing the recommendations contained in the Task Force Report.

3. The report to be filed annually by April 15 shall also include a description of changes in facility utilization, student attendance, grade structure, or curriculum, etc. that are proposed to be implemented in the succeeding school year, and sufficient information relating to such changes to permit the Court to determine their impact upon the maintenance of desegregated schools in Hillsborough County and the elimination of any lingering vestiges of prior discrimination from the school system. The Court recognizes and anticipates that there will be modifications each year of the projected student assignment patterns contained in Appendix 1 to the Task Force Report to take account of demographic or other

changes that occur. In making such modifications, the school district should seek to minimize (to the extent practicable the number of schools which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14). The school district shall not implement changes until they have been approved by the Court.

4. The report to be filed annually by April 15 shall also include a description of all proposed school construction (including substantial renovation and remodeling) that is planned and that has not yet been specifically approved by the Court (whether or not the construction is described or referred to in the Task Force Report) including sufficient information about proposed construction projects to permit the Court to determine their impact upon the desegregation status of the Hillsborough County public schools. In the event an objection to any proposed construction project is served upon counsel for the school district, then the school district shall not undertake any such construction project until it has been approved by the Court.

5. The report to be filed no later than April 15, 1997 shall include, as separate exhibits or appendices, specific procedures and adequate policies to support and control student assignments, to design school attendance zones, to determine the configuration of the clusters, to design and monitor magnet school and programs, to monitor desegregation equity and to determine the use facilities" (Task Force Report, at p. 15 ¶ 1), together with sufficient background information to permit the Court to determine the adequacy of what is proposed to guide implementation of the middle school program in accordance with its goals and the requirements of the law.

6. Additionally, the report to be filed no later than April 15, 1992 shall include, as separate exhibits or appendices, adequate descriptive material and policies, guidelines, or resolutions adopted by the School Board covering the following areas:

> a. The process for developing and implementing, by the 1993-94 school year, of a district-wide multi-cultural curriculum, including a general description of how the content of the curriculum shall be developed, the extent of staff training related to curriculum implementation that will be provided, and the means of monitoring the results of implementation and training (see Task Force Report, at p. 15 ¶ 7);
>
> b. The content of, and process for, implementing a comprehensive process of in-service training for staff on a district-wide basis in human relations and instructional strategies that are particularly suitable for diverse student populations, including the method to be used to assess the efficacy of the training and its impact on student outcomes (see Task Force Report, at p. 15 ¶ 8);
>
> c. The anticipated activities and function of, and the process for developing and implementing, the proposed district-wide center for parent education in accordance with the recommendations of the Task Force (see Task Force Report, at p. 15 ¶ 9);

d. The scope and methodology of both the initial race equity needs assessment and the subsequent regular monitoring of equity issues to be carried out by the district, as well as the manner in which the district will utilize the results of these assessments in making any necessary adjustments to, and otherwise facilitating, the successful implementation of the middle school proposal and the desegregation goals of this action (see Task Force Report, at p. 15 ¶ 10);

e. Policies and procedures for assuring that (i) all schools and programs, including those that are geographically located in the "core" or "inner city," are treated on the same basis with respect to assessing and meeting the needs of their pupils; (ii) no schools, programs, or students enrolled therein are penalized in the distribution of resources or in any other manner by virtue of low enrollment or other attributes of the schools or programs during the initial years of implementing the middle school proposal and the Task Force Report; and (iii) all decisions about schools, programs, and personnel are made so as to facilitate the attainment of the goals of the middle school proposal and of this action (see Task Force Report, at pp. 7 ¶¶ 12-15, 15-16 ¶¶ 12-13).

The Court retains jurisdiction over this action to receive the information required above and to enter the further

Orders necessary to effectuate the implementation of the middle school plan consistent with the requirements of the Constitution. To the extent prior Orders are not modified by the terms of this Order, they shall remain in effect.

/S/_____
ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Agreed to:

/s/ _____
WARREN H. DAWSON
14 67 Tampa Park Plaza
Tampa, Florida 33605
(813) 221-1800
JULIUS L. CHAMBERS
NORMAN J. CHACHKIN
99 Hudson Street
New York, New York 10013
(212) 219-1900

Attorneys for Plaintiffs

/s/_____
W. CROSBY FEW
109 North Brush Street, Suite 202
Tampa, Florida 33602
(813) 229-6401

Attorney for Defendants

APPENDIX 5

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 58-3554-CIV-T-17

[Filed October 14, 1997]

ANDREW L. MANNING, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
THE SCHOOL BOARD OF	)
HILLSBOROUGH COUNTY,	)
FLORIDA (formerly BOARD OF	)
PUBLIC INSTRUCTION OF	)
HILLSBOROUGH COUNTY,	)
FLORIDA), *et al.*,	)
Defendants.	)
	)

PLAINTIFFS' OBJECTIONS TO REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1), plaintiffs hereby respectfully submit the following objections to the *Report and Recommendation* issued in the above-captioned matter:[1]

1. Plaintiffs object to the *Report and Recommendation* finding that the attainment of unitary status is a material change in circumstance sufficient to justify the termination of the 1991 *Consent Order*. *Report and Recommendation,* dated August 26, at 64-65 (hereinafter *"Report and Recommendation")*. Plaintiffs contend that there is no basis for such a finding and that such a finding clearly conflicts with existing law on the modification and/or vacation of consent orders pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Under the Supreme Court's ruling in *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992), there must be a changed factual or legal circumstance, unforeseen by the parties at the time they entered into the agreement, in order to warrant modifying, much less vacating a consent decree. This requirement has not been met and cannot be met here. In a school desegregation case, it is inconceivable that a ruling seeking a declaration of unitary status was unforeseen at the time the parties entered into the 1991 *Consent Order*.

2. Plaintiffs object to the *Report and Recommendation* finding that plaintiffs' *To Enforce Court Order* should be denied. *Id.* at 63-64. For the same reasons that the 1991 *Consent Order* cannot be prematurely modified or vacated, a *Motion To Enforce Court Order* cannot be summarily denied without consideration of all of the potential

---

[1] These objections and the underlying basis for these objections are discussed in further detail in the accompanying brief in support of the objections.

issues to be resolved regarding a violation or potential violation of court orders.

3. Plaintiffs object to the *Report and Recommendation* finding that there are no remaining vestiges of the *de jure* segregated school system. *See id.* at 65-84; *see also id.* at 12-57. Plaintiffs contend that there is no basis for a finding that defendants have met their burden and demonstrated that they have eliminated all vestiges of the prior dual system. Such a finding is at odds with the applicable case law.

a. The *Report and Recommendation* should not have found defendants unitary in the area of student assignment. Defendants have not eliminated the vestiges of the prior *de jure* segregated school system to the extent practicable in this area. The *Report and Recommendation* gave insufficient weight to evidence demonstrating that defendants failed to fulfill their affirmative constitutional obligation to desegregate to the extent practicable in the area of student assignment after the issuance of the 1971 *Order*. *See id.* at 15-34, 65-75. Demographic change does not account solely for racial identifiability in the Hillsborough County school system. Demographic change does not account for racial identifiability caused by defendants' failure to perform acts, such as the selection of school sites and the failure to inform parents of the majority-to-minority transfer program. Furthermore, demographic change cannot be fairly attributed to the differences between the projections in population as predicted by defendants and the existing population. There is no reliable evidence concerning this level of demographic

change and even if there was, the 1991 *Consent Order* required defendants to address any such change as part of the *Consent Order*.

b. The *Report and Recommendation* should not have found defendants unitary in the area of faculty and staff assignment. Defendants have not eliminated the vestiges of the prior *de jure* segregated school system to the extent practicable in this area. The *Report and Recommendation's* finding does not address the significant evidence that patterns consistent with *de jure* segregation still exist with respect to this factor. The *Report and Recommendation* finding is not based on an analysis of faculty and staff. *See id.* at 76 (faulting the analysis of Dr. Stevens for including data on staff); *see id.* at 36 (holding that "[n]one of the Court's Orders have ever required the School Board to provide racial balance at the upper management level"). There is no basis in the law for excluding employees, or classes of employees, when evaluating defendants' efforts to address this factor. Under the proper analysis of *both* faculty and staff, the evidence is clear that there are remaining vestiges. Even considering faculty alone, vestiges exist, contrary to a finding that defendants have desegregated to the extent practicable in this area.

c. The *Report and Recommendation* should not have found defendants unitary in the area of facilities. Defendants have not eliminated the vestiges to the extent practicable in this area. Defendants have not provided evidence sufficient to know whether their obligations have been properly discharged. The *Report*

and Recommendation does not adequately take into consideration the lack of evidence explaining defendants' decisions about site selection and the fact that predominantly black schools are more likely to be overcrowded than other schools. *See id.* at 42-44, 79-80. Nor does the record provide evidence sufficient for the Court to conclude that resources with respect to facilities are fairly distributed and provided, irrespective of race. *See id.* at 46-48, 79-80. Indeed, defendants presented no evidence that the vestiges have been eliminated, in comparison to the previous *de jure* school system, so there was no basis for the finding in the *Report and Recommendation* that the vestige of providing facilities in a racially discriminatory manner had been eliminated to the extent practicable.

d. The *Report and Recommendation* should not have found defendants unitary in the area of transportation. Defendants have not eliminated the vestiges to the extent practicable in this area. The *Report and Recommendation* find that the disproportionate transportation burden on black students is not inconsistent with defendants' affirmative constitutional obligations. *See id.* at 39 (finding that plaintiffs had to object before defendants were obligated to do anything about a racially disparate transportation burden). However, there is no discussion about the link between this disparity and the student assignment and site selection policies of the defendants. *See id.* at 37-40, 77-78. Defendants presented evidence which was insufficient to support the *Report and Recommendation's* finding that defendants have ensured that black students who are bused as a result

of defendants' policies have adequate access to extra-curricular activities.

e. The *Report and Recommendation* should not have found defendants unitary in the area of extra-curricular activities. Defendants have not eliminated the vestiges to the extent practicable. The *Report and Recommendation* should not have concluded that the system is unitary with respect to extra-curricular activities, where defendants have not presented evidence sufficiently probative to demonstrate that their burden had been met. *Id.* at 40-42, 77-79.

f. The *Report and Recommendation* should not have found defendants unitary in the area of quality education. Defendants have not eliminated the vestiges to the extent practicable. The *Report and Recommendation* rely on resource allocation data which: (1) fails to address the relationship between the school system today and the prior *de jure* segregated school system, (2) is not sufficiently reliable to be the basis for significant findings of fact and conclusions of law, and (3) relies on two years of data, one of which was described by defendants' own expert as "atypical." *Id.* at 46-48. Given that this data is taken in the midst of a tremendous overhaul of the entire school structure, this information is too unreliable to support a finding of unitary status with respect to this factor. The *Report and Recommendation* rely on evidence of academic outcomes which: (1) does not make a comparison between the current achievement rates of black and white students and the achievement rates of black and white students in the formerly *de jure*

segregated school system, (2) is not measuring the socioeconomic status of actual Hillsborough County public school students, (3) illogically relies on racial data to explain why race is not a factor in the differences in academic outcomes, and (4) does not explain fully the impact of racial discrimination in differences in student performance. *Id.* at 48-57, 82-84. The *Report and Recommendation* do not adequately take into consideration the alarming racial disparities in suspension rates in the Hillsborough County school system.

3. Plaintiffs object to the *Report and Recommendation* finding that defendants have been in good-faith compliance with the Court's 1971 *Order* and the 1991 *Consent Order*. *See id.* at 57-62, 84-86. As a preliminary matter, the *Report and Recommendation* errs in finding defendants in good-faith compliance with an order, the 1991 *Consent Order*, that defendants have not yet fulfilled. The *Report and Recommendation* did not give sufficient weight to the lay testimony presented by plaintiffs, which indicated that not a single black person was willing to testify in favor of unitary status, including the lone black defendant in this case. *See id.* at 84-85 (holding that "opinions and the anecdotal evidence offered by plaintiffs are outweighed" by defendants' evidence). The *Report and Recommendation* also gave insufficient weight to the facts probative of good-faith compliance. First, the defendants exhibited great familiarity with the rules for special transfers, yet claimed to have little understanding that the majority-to-minority transfer program was a viable desegregation option for the school system until nearly 25 years after the entering of the 1971 *Order*. Second, defendants took actions inconsistent with statements made in

Annual Reports filed with the Court, including a promise to take action to address any school with a "race ratio significantly deviat[ing] from the desegregation plan." When asked about the statement at trial, defendants disavowed the statement as representing School Board policy, although it is clearly identified as such in the Annual Reports. Third, defendants claim that critical school desegregation policy decisions were made based on one-time ex *parte* conversations with the Court, which were not memorialized in writing nor explained to plaintiffs, until issues about compliance with this Court's orders arose.

4. Plaintiffs do *not* object to the imposition of a transition phase in this case. *See id.* at 88-89. While the law does not generally allow for such a period, given the existence of a consent order which has not yet been fulfilled and cannot be considered to be complete, such a period will ensure that the remainder of the implementation process for the middle school plan can be monitored and the rights of the plaintiffs adequately protected.

WHEREFORE the reasons stated above and as set forth more fully in the accompanying brief, plaintiffs file these objections and respectfully request that the Court find the *Report and Recommendation* deficient in these respects, not uphold any of the findings of fact and conclusions of law upon which these deficiencies are based, and thus, find that defendants have not eliminated the vestiges of segregation to the extent practicable and to have not been in good-faith compliance with this Court's orders.

Respectfully submitted,

_____

Elaine R. Jones
Director-Counsel

Victor A. Bolden
Jacqueline A. Berrien
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Fl.
(212) 219-1900

Attorneys for plaintiffs

Warren Hope Dawson
1467 Tampa Park Plaza
Tampa, Florida 33605
(813) 221-1800
Fla. Bar No. 103926

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 58-3554-CIV-T-17

[Filed October 14, 1997]

ANDREW L. MANNING, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
THE SCHOOL BOARD OF	)
HILLSBOROUGH COUNTY,	)
FLORIDA (formerly BOARD OF	)
PUBLIC INSTRUCTION OF	)
HILLSBOROUGH COUNTY,	)
FLORIDA), *et al.*,	)
Defendants.	)
	)

BRIEF IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO REPORT AND RECOMMENDATION

Introduction

Plaintiffs, Andrew L. Manning, *et al.*, file this brief in support of the objections made to the Magistrate Judge's *Report and Recommendation* in the above-captioned action.

Plaintiffs have four basic objections to the ultimate findings reached in the *Report and Recommendation,* which also encompass numerous findings of fact and conclusions reached by the Magistrate Judge: (1) attainment of unitary status is not a "material change in circumstance" sufficient to justify the termination of the 1991 *Consent Order,* (2) plaintiffs' *Motion To Enforce Court Order* should not be denied, (3) vestiges of the *de jure* segregated school system remain in the Hillsborough County school system, and (4) defendants have not demonstrated good-faith compliance with this Court's 1971 *Order* and 1991 *Consent Order.* In addition to these objections, plaintiffs do not object to this Court considering the imposition of a transition phase in this case.

Factual and Procedural Background

Plaintiffs filed this action in 1958. It was not until 1971 that any progress toward desegregation began:

> Almost ten years ago this Court found as a matter of fact that prior to and after May 17, 1954, defendants operated, maintained and staffed a completely dual school structure. The school board made no attempt whatever to dismantle the system until September 1961. *In the intervening ten years the defendants have at no time taken any steps which have had the effect of significantly altering the system's racially biased student assignment system.*

1971 *Opinion and Order* at 5-8 [hereinafter "1971 *Order*"] (emphasis supplied). As the Court in its 1971 *Order* stated:

> To obviate any doubt that there is and has been state-compelled segregated schools in Hillsborough County, which this Court and others have previously found and *again, so finds,* this opinion and order will necessarily be in some detail.

Id. at 1 (emphasis supplied). In that *Order,* the Court set forth the scope and nature of relief necessary to ensure the protection of the constitutional rights of the plaintiffs in this case, blacks schoolchildren in the Hillsborough County school system:

> (a) The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.
>
> (b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

Id. at 43-44. The 1971 *Order* further obligated defendants to act affirmatively to address segregation and not passively. This Court explicitly rejected the position "that the Constitution does not require integration but only forbids segregation has long been rejected." *Id.* at 43 *(citing United*

States v. Jefferson Board of Education, 372 F.2d 836 (5th Cir. 1966), *aff. en banc,* 380 F.2d 385 (1967)).

In a subsequent order issued on July 2, 1971, this Court specifically retained jurisdiction "for such further action as may be necessary and required." *Opinion and Order,* filed July 2, 1971, at 10 ¶ 1. It was clear that "the school board has a continuing responsibility" to desegregate the public schools of Hillsborough County, Florida. *Id.* The school board has acknowledged as much on occasions, including in July 7, 1972, when defendants submitted to the Court "for consideration and approval" a series of attendance zone boundary changes that the "school Board has adopted ... to continue in compliance with this Court's orders." *Report by Defendant School Board,* filed July 11, 1972, at 1.

Defendants' compliance with Court's order was an issue, even after the 1971 *Order.* On at least one occasion, the Court found it necessary to remind defendants of their continuing obligations under its decrees. On January 14, 1975, having reviewed the previous report of the school board setting out school enrollments as of December 2, 1974, the Court directed the Board:

> to file with the Court on or before March 21, 1975, a supplemental plan designed to insure that the requirements of the Court's previous orders insofar as they relate to Lee Elementary School will be complied with as of the beginning of the 1975-76 school year. In the event the action proposed in said supplemental plan or plans will affect other schools in the system, or changes for other schools are

> required, the nature and extent thereof will be indicated as part of said plan. In this regard the attention of the Board is specifically directed to Cleveland, DeSoto and Gary Elementary Schools respectively.

Order, filed January 14, 1975, at 1 (emphasis supplied).

The Superintendent of the Hillsborough County school system appointed a task force to explore how the school district could establish middle schools, modify and restructure its existing plan for student assignment for that purpose, and *(inter alia)* maintain desegregation. *See Middle School Task Force Report 3,* appended to October 24, 1991 *Consent Order* at 8 ¶ 1.1 [hereinafter *Task Force Report"].* Plaintiffs and defendants subsequently entered into negotiations concerning that long-term restructuring plan. The negotiations resulted in the presentation to the Court of a proposed Consent Order, describing the contemplated conversion of the school district, to a middle school grade organization through a series of modifications of currently existing student assignments. A primary feature of the plan was a cluster system, where "clusters" would be established, consisting of a group of elementary and middle schools and one high school. *Task Force Report,* at 6. The Court subsequently adopted this proposed order. 1991 *Consent Order* [hereinafter, 1991 *Consent Order],* filed October 24, 1991.

The 1991 *Consent Order* modifies, but does not replace the 1971 *Order.* The 1991 *Consent Order* changed the Court's 1971 *Order's* plan with "the operation of single-grade school centers in predominantly black neighborhoods of Hillsborough County," *Consent Order* at 2, to "the creation --

on a uniform basis throughout the district -- of three-grade middle schools and four-year high schools...." *Id.* The agreement recognizes that this change will have a considerable impact on the school desegregation plan currently in place: "Because this change affects not only the curriculum and staffing of school facilities but also patterns of student attendance, it necessarily requires modification of the Court's Orders in this action." *Id.* at 1.

The 1991 *Consent Order* further states that all of the contemplated changes and planning for the proposed change would take seven years to implement. *Id.* at 5. During this seven-year time period, there will be yearly reporting and consultation on the implementation of the plan. *Id. "The* parties shall confer periodically during the period of implementing the middle school proposal and Task Force Report for the purpose of reaching agreement on specific implementation steps." *Id.* Indeed, the 1991 *Consent Order* clearly states that the agreement has to be considered tentative. There can be no clear and final understanding and assessment of the nature of all of the changes and implications of the plan until the seven-year plan has been fully implemented. There are two provisions, clarifying this aspect of the agreement as well as committing the defendants to address problems in implementation arising from the tentative nature of the plan. The first provision reads as follows:

> the parties recognize that the specific attendance proposals contained in Appendix to the Task Force Report are based upon projections and are subject to appropriate modification prior to actual implementation, in order to take account of intervening

> demographic or other changes and in order to carry out the explicitly articulated goals of the program.

Id. at 3 (footnote omitted). The second provision reads as follows:

> The Court recognizes and anticipates that there will be modifications each year of the projected student assignment patterns contained in Appendix 1 to the Task Force Report to take account of demographic or other changes that occur. In making such modifications, the school district should seek to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14). The school district shall not implement changes until they have been approved by the Court.

Id. at 5-6. No one will know what the student assignment plan in the Hillsborough County school system will be nor whether the plan will be effective in meeting its constitutional requirements, until at least the completion of this seven-year period in 1998.

The 1991 *Consent Order* further specifies the nature of the Court's continued involvement. It makes clear that the defendants will remain under court jurisdiction until implementation of this plan was completed and that the 1971 *Order* is still in effect:

> The Court retains jurisdiction over this action to receive the information required above and to enter the further Orders necessary to effectuate the implementation of the middle school plan consistent with the requirements of the Constitution. To the extent prior Orders are not modified by the terms of this Order, they shall remain in effect.

Id. at 9.

In 1994, plaintiffs filed an *Amended Motion To Enforce Court Order and Consent Order and For Further Relief* and *Memorandum,* seeking relief under the 1971 and 1991 Orders. Specifically, it was alleged that defendants failed to address racial identifiability in the West Tampa Elementary School, which at the time of the implementation of the "cluster" including the school, had a 48% black population and 15 other schools in the Hillsborough County school system which had a black population of more than 40%. Plaintiffs subsequently filed their *Proposed Findings Of Fact And Conclusions Of Law,* after a hearing on whether the defendants should be required to do more to desegregate the West Tampa Elementary School. *Defendants' Proposed Findings Of Fact And Conclusions Of Law* argued that neither the 1971 nor 1991 Orders placed such obligations on them. Defendants, at no time, argued that the 1991 *Consent Order* should be modified.

The Magistrate Judge's *Report and Recommendation* held that the language in the 1971 *Order* does not "support Plaintiffs' reading of the 1971 Order as imposing an ongoing duty to maintain a particular racial balance once Defendants

have affected compliance with its terms." *Report and Recommendation,* at 14. The *Report and Recommendation* adopted the defendants' view on the scope of the provisions contained in the 1991 *Consent Order*. "The Consent Order clearly provides that in making *modifications* to the projected student attendance patterns, the school district should seek to minimize, to the extent practicable, the number of schools which deviate from the system-wide student enrollment ratios." Plaintiffs objected to the Magistrate's *Report and Recommendation* on the basis that the Magistrate failed to require the defendants to fulfill their affirmative constitutional obligations.

The Magistrate's *Report and Recommendation* expressed concern that there was substantial change in the projections on student enrollment at various schools. *Id.* at 41 ("For example, Robles was projected to have 76% black students and had 90% black students in 1993. Edison (64%) had 74%. Sulphur Springs (59%) had 70%. Oak Park (58%) had 66%. Graham (58%) had 63%. Cleveland (50%) had 59%. Foster (39%) had 57%. Whitter (40%) had 56%, and Van Buren (27%) had 50%."). The *Report and Recommendation* raised the issue of whether the 1991 *Consent Order* should be modified in order to address the ever-growing gap between the defendants' student attendance projections and actual student enrollment, where this gap demonstrated a marked increase in the degree of racial identifiability in the Hillsborough County school system. *Id.* at 41-42.

This Court's *Order Recommitting Matter To Magistrate,* rather than resolving the issue of compliance, recommended instead "that the parties and the Court determine whether the Hillsborough County school system has achieved

unitary status." *Order Recommitting Matter To Magistrate,* at 2. The Court asserted that "uncertainty" about the lack of a finding of unitary status "effectively complicates the analysis of the current controversy and demonstrates the need to expand the scope of the inquiry to a full-fledged determination of whether the Hillsborough County school system has in fact achieved unitary status." *Id.* at 3.

In accordance with this *Order Recommitting Matter To Magistrate,* an evidentiary hearing was held on October 21-25 and on October 28-29, 1996. At the evidentiary hearing, both sides presented lay and expert testimony. Defendants' lay testimony consisted of various school district staff, including the Administrative Assistant to the Superintendent, Dr. John Miliziano; the current Superintendent, Dr. Earl Lennard; several district administration staff members; and current School Board members. Plaintiffs' lay testimony consisted of the named plaintiff, Andrew Manning; parents of the black students currently enrolled in the Hillsborough County school system, Mrs. Mae King and Mr. Darrell Daniels; one student, Ronnie King II; leaders of local civic organizations, Mrs. Joanna Tokley, President of the Tampa Urban League and Mrs. Ann Porter, President of the Tampa branch of the NAACP; a former school system employees, Dr. Sam Horton, Dr. Walter Sickles and Dr. John Heuer; and current School Board members.

To present their expert testimony, defendants called Drs. David Armor and William A. V. Clark. Dr. Armor, a sociologist and currently a research professor at George Mason University in Virginia, has been a consultant for a number of school boards and government agencies on school

desegregation. Tr. III at 3-5.[1] He has worked at the Rand Corporation and for the United States Department of Defense. *Id.* at 5. Dr. Armor has also authored articles and/or conducted studies on school desegregation and academic achievement. *Id.* at 9. He has testified in unitary status hearings in cases, such as DeKalb County, Georgia, Savannah, Georgia, Muscogee County (Columbus), Georgia, Wilmington, Delaware and Dallas, Texas. *Id.* at 11-12. In this case, Dr. Armor analyzed on student assignment, faculty and staff assignment, resource allocation and academic outcomes. *See generally DX 1.* Dr. Clark is a geographer with a Ph.D. from the University of Illinois in Champaign-Urbana and currently a professor at the University of California at Los Angeles. Tr. II at 4-5. He has published in the areas of geography and demography. *Id.* at 5-6. Dr. Clark has testified in unitary status hearings in Norfolk, Virginia *(Riddick v. Norfolk),* Oklahoma City *(Dowell),* DeKalb County, Georgia *(Freeman v. Pitts),* Dallas, Texas (Tasby), Muscogee County, Georgia *(Lockett)* and Kansas City, Missouri *(Jenkins v. Missouri). Id.* at 7. In this case, Dr. Clark has conducted an analysis on the impact of demographic change on the Hillsborough County school system. *See generally DX 2.*

Plaintiffs called Drs. Leonard B. Stevens, Fred Shelley and Robert Crain as experts. Dr. Leonard B. Stevens is an independent consultant on desegregation and other issues related to educational equity, who has worked for school districts, state education agencies, the United States Department of Justice, universities, federally funded desegregation assistance centers and plaintiffs in school

---

[1] Citations to the evidentiary hearing transcript will be abbreviated as "Tr. volume # at page."

desegregation cases. *See PX 1* at 35-36. Dr. Stevens also served as a special assistant to the Chancellor of the New York City public school system, and as a federal court monitor for the United States District Court in Cleveland, Ohio for a ten year period. Tr. IV at 110-111. He has provided testimony in five unitary status cases, by court testimony and deposition. *Id.* at 117. These cases are Wilmington, Delaware, St. Louis, Missouri, Muscogee County, Georgia, Midland, Texas and San Jose, California. *Id.* Since 1991, Dr. Stevens has served as an expert to the plaintiffs in this case, which included consultation regarding the 1991 *Consent Order* and an annual review of the annual reports produced pursuant to that *Consent Order*.[2] *Id.* at 118. For this case, Dr. Stevens provided an analysis of the following areas: student assignment, faculty and staff assignment, facilities, transportation, extracurricular activities, suspension rates, gifted education, dropouts and potential remedies. *See generally PX 1.*

Dr. Fred Shelley is a geographer and professor at Southwest Texas State University in San Marcos, Texas. Tr. IV at 22-23. Dr. Shelley's area of expertise is political geography, a field which assesses and identifies the causes of a particular phenomenon in a given geographic area, which includes analysis of demographic information. *See id.* at 27-29. He has written several books and more than 40 articles in his field. *Id.* at 26, 31. He is a member of the Association of

---

[2] In the course of work conducted on this case, Dr. Stevens has visited the school district on a dozen occasions, met and consulted with various staff members, visited schools, driven through and around various school attendance zones, and met with parents. *PX 1* at 1.

American Geographers and has received a grant from the National Science Foundation for his work. *Id.* at 30. Dr. Shelley called Plaintiffs as a rebuttal expert to examine the extent to which increases racial imbalance in the Hillsborough County public schools could be attributed to natural demographic change, as alleged by Dr. Clark. *See id.* at 34-36; *see also PX 2.*

Dr. Robert Crain is a professor of sociology and education at Teachers College, Columbia University. Tr. VI at 148. Dr. Crain's area of expertise is research methodology and school desegregation. *Id.* at 150-156. He previously worked at the Rand Corporation and while there, directed the design of an extensive study on school desegregation. *Id.* at 151. He has published five books on school desegregation, on topics ranging containing recommendations on achieving effective desegregation of schools to the effects of racism and segregation on black adults. *Id.* at 152. He has published several articles on research methodology, including a large study on the proper methodology for researching the effects of school desegregation. *Id.* at 152-154; *see also PX 65* (Dr. Crain's curriculum vitae). Dr. Crain has testified in ten to twelve school desegregation cases. *Id.* at 154-155. Dr. Crain testified as a rebuttal expert to the achievement analysis conducted by Dr. Armor. *Id.* at 155-156.

Both parties submitted proposed findings of fact and conclusions of law to Magistrate Judge Jenkins on April 10. On May 22, closing arguments were held before the Magistrate Judge. The Magistrate Judge's *Report and Recommendation* were issued on August 26. *Report and Recommendation,* dated August 26, 1997. The *Report and Recommendation* made four major findings: (1) plaintiffs'

1994 *Motion To Enforce Court Order* should be denied as no violations have been shown, (2) a finding of unitary status is not barred by the 1991 *Consent Order,* (3) there are no remaining vestiges of the *de jure* segregated system, and (4) defendants have complied in good-faith with the Court's orders. *Id.* at 63-90. *The Report and Recommendation* also asked the parties to respond as to whether continued court supervision was necessary for a limited period of time. *Id.* at 88-89. The *Report and Recommendation* ultimately concluded that:

> [T]his Court should find that the defendants have demonstrated that the public school system of Hillsborough County has attained unitary status and should be released from Court supervision pursuant to such further Orders as may be appropriate under the circumstances.

Report and Recommendation at 90.

ARGUMENT

I. PLAINTIFFS OBJECT TO THE *REPORT AND RECOMMENDATION* FINDING THAT ATTAINMENT OF UNITARY STATUS IS A CHANGED CIRCUMSTANCE WARRANTING VACATION OF THE 1991 *CONSENT ORDER*

The *Report and Recommendation* found that: "Attainment of unitary status is a material change in circumstance which could justify termination of court supervision over the School Board." *Report and*

Recommendation at 65. This finding cannot withstand scrutiny under the applicable law. Applying the appropriate standard, the attainment of unitary status could not be a "changed circumstance" warranting modification or vacation of a consent order.

This Court must take into consideration the 1991 *Consent Order* when determining the future scope of court jurisdiction in this case:

> A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in and be enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees.

Rufo v. Inmates Of Suffolk Jail, 502 U.S. 367, 378 (1992). A consent decree "is a final judgment that may be reopened only to the extent that equity requires." *Id.* at 391. While a changed circumstance may be the basis for modifying a consent order, it is not just any changed circumstance which permits a change of the court order. Under the *Rufo* standard, a "changed circumstance" only exists to the extent that such a circumstance was not foreseen at the time of the agreement. A "significant change in factual conditions" cannot be predicated on events actually anticipated at the time of the entering of the decree. *Rufo*, 502 U.S. at 385. There is no evidence -- nor could defendants present any plausible evidence -- that unitary status was an unforeseen circumstance when the parties entered into the 1991 *Consent Order*.

II. PLAINTIFFS OBJECT TO THE *REPORT AND RECOMMENDATION* FINDING THAT DEFENDANTS HAVE ELIMINATED THE VESTIGES OF THE PRIOR *DE JURE* SEGREGATED SCHOOL SYSTEM TO THE EXTENT PRACTICABLE

The *Report and Recommendation* find that defendants have eliminated to the extent practicable the vestiges of the prior *de jure* segregated school system for each of the *Green* factors, student assignment, faculty and staff assignment, facilities, transportation, extracurricular activities, and quality education, another factor now commonplace in a unitary status inquiry.

As a threshold matter, the *Report and Recommendation* does not address the relationships among the many *Green* factors. The significance is that:

> [T]he Green factors may be related or interdependent. Two or more Green factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well.... As a consequence, a continuing violation in one area may need to be addressed by remedies in another.

Freeman, 503 U.S. at 497. Thus, the failure to make these linkages and discuss its impact is problematic. The numerous *Green* factors are inextricably linked to the grade restructuring plan being implemented pursuant to the 1991 *Consent Order.*

See 1991 *Consent Order* at 1 ("Because [the grade restructuring process] affects not only the curriculum and staffing of school facilities but also patterns of student attendance, it necessarily requires modification of the Court's Orders in this action"). Therefore, the absence of any certainty to this plan leaves the status of the *Green* factors in limbo, until at least the full implementation of that plan. Without more, a declaration of unitary status cannot be achieved.

In the area of student assignment, the *Report and Recommendation* find defendants unitary in the area of student assignment:

> On the whole, the School Board has demonstrated that its schools are unitary as to student assignment policies and practices and that the increased black enrollment at about 10% of the schools which are substantially disproportionate to the district-wide racial ratios are due to increased number of black school-age children residing in those neighborhoods.

Report and Recommendation at 75 (citations omitted). In reaching this finding and the findings on the other *Green* factors, the Magistrate Judge shifted the burden of proof from the defendants to the plaintiffs. A prima facie case of having eliminated the vestiges of the prior *de jure* segregated school system is based on whether the plaintiffs ever raised a problem with a *Green* factor, rather than whether defendants have taken steps to eliminate the vestiges. This standard of review, however, has little basis in law.

After this Court's ruling in 1971, the School Board was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Board of New Kent County,* 391 U.S. 430, 437-438 (1968); *see also Freeman v. Pitts,* 503 U.S. 467 (1992); *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15 (1971); *Jacksonville Branch, NAACP v. Duval Cty. Sch. Bd.,* 883 F.2d 945, 950-51 (11th Cir. 1989). The affirmative obligations of the School Board to desegregate do not end until it has achieved unitary status. *Harris v. Crenshaw County Bd. of Educ.,* 968 F.2d 1090, 1094 (11th Cir. 1992).

The Eleventh Circuit has stated:

> To fulfill this duty, school officials are obligated not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system.

Id. at 1095. The School Board's duty includes considering the construction and abandonment of school facilities, *id.*, and drawing "zone lines so as to affirmatively promote desegregation of racially dual school systems." 1971 *Order* at 26 *(quoting Youngblood v. Board of Public Instruction of Bay County,* 430 F.2d 625, 629 (5th Cir. 1970)). Once a school district is under a court order to desegregate its schools, mere neutrality is not an option. Nor does the responsibility for

determining how defendants should fulfill their obligations rest with the plaintiffs.

This Court made clear in 1971: "Initially it is the duty, not of the Court, not of the plaintiffs, but of the school board acting affirmatively and positively to end segregation in Hillsborough County." 1971 *Order* at 41. Defendants have been on notice long ago that "that the Constitution does not require integration but only forbids segregation has long been rejected." 1971 *Order* at 43 (citing *United States v. Jefferson Board of Education,* 372 F.2d 836 (5th Cir. 1966), *aff. en banc,* 380 F.2d 385 (1967)). The appropriate inquiry is whether defendants have been affirmatively seeking to integrate the Hillsborough County school system in all of the *Green* factors. Given the size of this district, minimal evidence cannot meet the burden. The *Report and Recommendation* finding on the *Green* factors is not based on this standard.

The *Report and Recommendation* failed to address the fact that demographics in Hillsborough County are different from other localities. The change is far less dramatic and more incremental than in *Freeman. See Freeman,* 503 U.S. at 475 ("The school system that the District Court ordered desegregated in 1969 had 5.6% black students; by 1986, the percentage of black students was 47%"). In addition, the identification of pure demographic change is further complicated by the implementation of a middle school plan, which requires considerable change, but where the statistical information on the precise demographic effect will not be discernible until the 2000 Census. Furthermore, given the missed opportunities to desegregate in opening and closing schools, developing magnet schools, administering m-m and special transfer programs and in implementing the middle

school plan, this Court finds defendants' actions contributed to, if not directly caused, racial identifiability in the Hillsborough County school system.

The issue is whether defendants bear any responsibility for the racial identifiability and, if so, the extent to which the defendants are responsible. Defendants have acted, or failed to act, in a number of ways which contributed to racial identifiability of the Hillsborough County Public Schools. First, the school district does not have a working definition of a desegregated school. *Compare* 1994 Evidentiary Hearing Tr. 2 at 145 (testimony of Dr. John Miliziano that 50% black school is racially identifiable) *with* 1994 Evidentiary Hearing Tr. at 260 (testimony of Kenneth Allen, Director of Pupil Administrative Services that a school isn't racially identifiable until 100% black). Second, defendants have admitted that, since the 1977-1978 school year, more than 300 modifications in student assignment have been made to relieve overcrowding, to accommodate the opening of newly constructed facilities, or for other reasons, but *not* for the purpose of affecting the racial ratio of a school. *See PX 1* at 8-9; *see also PX 1b*. The opening and closing of schools created new attendance zones, altered existing attendance zones and required the redeployment of inner-city satellite zones from school to school. *PX 1* at 8-9. These events provided an opportunity to address any racial identifiability in the school system, but such opportunities were not seized upon by defendants. *Id.* at 9. During this time period from 1977-1995, when significant changes in construction and student assignment occurred, the attendance zones of twelve of the fourteen elementary schools on the list of schools very close to, at or more than 20 percentage points above the district-wide black student ratio were changed only once or not at all.

Id. at 9. Nevertheless, under the satellite program, a program overwhelmingly affecting black students, students were redeployed to different schools as the need arose. Tr. I at 102.

Despite the existence of majority black schools since *at least* 1977, as of April 19, 1996, there was not one majority-to-minority (m-m) transfer granted. Tr. I at 91; *see PX 14.* Indeed, there is no evidence (1) that a m-m transfer was ever seriously considered until recently; (2) that defendants understood how to operate a m-m program; or (3) that defendants made any effort to have an effective m-m transfer program. Dr. John Miliziano, the Administrative Assistant to the Superintendent, testified not only that he was unaware of how m-m transfer programs worked in other school districts, but also that he had not read any articles "or anything" about m-m programs. *Id.* at 87-89. The school district first gave out information about m-m transfers on July 18, 1995, nearly twenty years after there were majority black schools. *See id.* at 106. Even today, there are no special affirmative marketing efforts with respect to m-m transfers.

In fact, Dr. Miliziano had to be reminded of the existence of the m-m transfer program and its applicability to majority black schools. This is especially significant because no Hillsborough County school system employee has more extensive school desegregation responsibilities than Dr. Miliziano. *Id.* at 106-107.[3] Dr. Miliziano testified that students

---

[3] Dr. Miliziano testified to the following on this matter:

> It wasn't until recently that I, as a person who has spent many, many years in dealing with the court order, maybe it's stupidity on my part, but I didn't

could have applied for a m-m transfer and been denied because the rules for the special assignment program were applied. Tr. I at 92-93. This testimony reveals either a profound lack of understanding or a lack of familiarity with the July 1971 *Order,* which lists rules for all transfers and identifies m-m transfers as the first exception to the transfer rule. *See* July 1971 *Order* at Exhibit 2, page 1. Thus, m-m transfers are special assignment transfers. *See id.*

Magnet schools have been used by districts for desegregation purposes since the 1970s. *PX 1* at 10. The federal government has provided special funds for such schools since the 1980s. *Id.* The Hillsborough County school system did not create its first magnet schools until 1993. *Id.* By 1997, according to defendants' middle school plan, there will be 8 magnet schools and an additional 6 magnet programs within certain schools. *Id.* The Hillsborough County school system's Joint Task Force Report #3 states that magnet schools may have up to a 40% black population in a magnet school. *Joint Task Force Report #3* at 15. This policy would facilitate addressing racial identifiability in zoned schools,

---

> even know that this hidden clause -- this clause, not hidden, but this clause in the consent order meant really anything.
>
> It wasn't until recently that it was brought to my attention that, hey, this thing is supposed to be done, and now that you have schools that are 50 percent black or higher, you're supposed to implement this policy.
>
> Tr. I at107.

considerably above the district-wide black student population. *PX 1* at 10.

In practice, black student enrollment at magnet schools is pegged close to the district-wide average. *Id.* at 10-11; *see PX 1c (Appendix).*[4] If the magnet schools were allowed to have a 40% black population, then 394 additional black students would have access to magnet programs. *See Appendix.* Moreover, there is no additional effort made to target black students in high percentage black schools to magnet schools to ameliorate racial identifiability. *Id.* at 11. In 1993, Middleton and Lee Elementary schools opened as magnet schools and are the oldest magnet schools in the district. *Id.* Middleton and Lee have enrollments of 826 and 448 respectively. *Id.* Nevertheless, not one of these schools has ever had more than 5 black students attend a 40% or more black school in the 1995-96 school year. *Id.; see also PX 1d (Appendix),* Tr. IV at 128-129[5].

The Hillsborough County school system is in the process of implementing a middle school plan. *See* Tr. IV at 130-131. In the upcoming 1997-1998 school year, six out of seventeen clusters are to be implemented. *See* Tr. I at 96; *see generally PX 7.* Nine out of the fourteen elementary schools with a greater than 40% black student population are to be implemented in the 1997-1998 school year. *Id.* at 96. While this process has not been completed, it is clear that this plan

---

[4] *PX 1c* is incorporated into the appendix attached to this opinion.

[5] *PX 1d* has been added to the appendix attached to this opinion.

has not been effective, in terms of the projections of race ratios for schools having a 40% or more black population. *PX 1* at 14; Tr. IV at 130-131. Furthermore, the middle school plan provided another opportunity to address any racial identifiability in the schools, but, according to current projections, there will be no race ratio relief for any of the elementary schools which have a 40% or more black student population. *Id.* at 14-15.

In fact, during the implementation of the middle school plan, racial identifiability has increased. *Id.* at 15-16; *PX 1e (Appendix)*.[6] Before the middle school plan, there were six schools with a 50% or more black student population. *PX 1e (Appendix)*. The middle school plan projected that, after implementation of the plan, this number would reduce to five. *Id.* By the fall of 1995, the number of schools with a 50% or more black student population doubled to twelve. *Id.* Dr. Miliziano expects that four more schools could be added to the 40% or more black population list, apart from those already on that identified in school district documents. Tr. I at 98.

None of the measures employed by defendants' expert, Dr. David Armor, mitigate the degree of racial identifiability in Hillsborough County elementary schools. Dr. Armor's dissimilarity index does not measure what's going on in an individual school. Tr. III at 135. Since the dissimilarity index provides no information about an individual school, then this measure does not suffice. *Id.* at 135.

---

[6] *PX 1e* has been incorporated into the appendix attached to this opinion.

In addition, neither of these measures shed any light as to whether there is any classroom segregation in the Hillsborough County public schools. The exposure index is not intended to detect whether there is segregation in the classroom or if school clubs or activities are integrated. *Id.* Nor do defendants provide data from any other source on the issue of in-school desegregation. Tr. IV at 17.

By Dr. Armor's own exposure index, the average black elementary school student attends a school which is 37% black, thirteen points above the district-wide for black students at the elementary level. Tr. III at 135-136.

Defendants have not put forth any evidence which suggests that addressing the degree of racial identifiability in any of these 17 schools is not practicable. Indeed, the evidence suggests that the middle school plan offers significant opportunities for further desegregation. By comparing PX 7 (chart detailing cluster configurations for the middle school plan from Fifth Annual Report) with *DX 7* (race ratio report for October 30, 1995), it is clear that many elementary schools on the racially identifiable list are in a cluster with non racially identifiable schools.

Edison Elementary School is in a cluster with Morgan Woods (10% black), Town & Country (27% black) and Woodbridge (21% black). *See PX 7* at 2. While Edison is a 75% black school, *DX 7* at 7, the other schools in the cluster, Morgan Woods (10% black), Town & Country (27% black) and Woodbridge (21% black), is well below a 40% black student population. *DX 7* at 14, 20, 22.

Cleveland Elementary School is in a cluster with Carrollwood, Forest Hills and Lake Magdalene. *PX 7* at 2. While Cleveland is 52% black, *DX 7* at 5, the other schools, Carrollwood (15%), Forest Hills (27%), and Lake Magdalene (12%), are well below a 40% black student population. *DX 7* at 4, 8, 10.

Sulphur Springs is in a cluster with Twin Lakes. *PX 7* at 2. While Sulphur Springs is 74% black, Twin Lakes, at 17% black, is well below a 40% black student population. *DX 7* at 18, 20.[7]

Graham and Foster are in a cluster with Broward, Egypt Lake, Mendenhall, and Seminole. *PX 7* at 3. While Graham and Foster have a black student population of 67% and 61% respectively, *DX 7* at 8, 9, Broward (34% black), Egypt Lake (22%), Mendenhall (30%), and Seminole (37% black). *DX 7* at 3, 7, 13, 17.

Robles is in a cluster with Folsom. *PX 7* at 3. While Robles has a 90% black population, *DX 7* at 16, Folsom is only 29% black. *DX 7* at 8.

Cahoon is in a cluster with Hunter's Green Elementary School. *PX 7* at 3. Cahoon is 52% black, but Hunter's Green is only 19% black. *DX 7* at 9.

---

[7] Since students who attend Sulphur Springs and Cleveland all attend Adams Middle School, arguably, there is room for more desegregation for Sulphur Springs than just Twin Lakes. *See PX 7* at 2.

Mort, Shaw and Witter are in a cluster with Tampa Palms Elementary School and two other elementary schools to be built after the 1995-1996 school year. *PX 7* at 3. While no data from the 1995-1996 school year is known about the schools slated for future construction, Tampa Palms Elementary School is only 14% black. *DX 7* at 19.[8]

Defendants cannot rely on natural demographic change as an explanation for the increase in racial identifiability in the Hillsborough County school system. Once again, the evidence is to the contrary. The population of Hillsborough County, Florida increased from 490,265 persons in 1970 to 834,054 persons in 1990 according to the United States Census. *PX 2* at 3. While the total population of Hillsborough County grew considerably between 1970 and 1990, the percentage of county residents who are African American remained almost constant between 1970 and 1990. *PX 2* at 3.[9] As defendants' expert acknowledged, "[t]he white and black populations [of Hillsborough County] increased at about the same rate" between 1970 and 1990. *DX 2* at 3.

While there was a slight decline in the percentage of African American Hillsborough County residents between

---

[8] While the *Report and Recommendation* states that these clusters are not the schools closest to each other, this analysis misses the point. *Report and Recommendation* at 26-29. The issue is that the clusters are an administrative choice made by the school district, which should be respected. Once that decision is made, defendants are obligated to desegregate to the extent practicable.

[9] African Americans comprised 66,648 of the County's 490,265 residents (or approximately 13.5% of the total county population) in 1970, and 110,283 of the County's 834,054 residents (or approximately 13.2% of the total county population) in 1990.

1970 and 1990, the percentage of persons ages 0-17 who are African American has increased slightly during this period. In 1970, there were 164,278 persons aged 0-17 in Hillsborough County, and 28,527 (or 17.4%) were African American. In 1990, Hillsborough County's total population of persons aged 0-17 was 202,274, and 39,163 (or 19.4%) were African American. *PX 2* at 3.

Despite these minor changes in the percentage of African American residents of Hillsborough County, the number of racially unbalanced[10] public schools in Hillsborough County has increased significantly over the past two decades. *PX 2* at 3, 6. In addition, the percentage of African American students attending racially unbalanced schools has also increased since 1971. *PX 2* at 6. Only 69 percent of Hillsborough County elementary school students attended racially balanced schools in 1995, compared with 97 percent of Hillsborough County elementary school students who attended such schools in 1971. *PX* 2 at 6; *DX 1,* Chart 1. Similarly, the percentage of junior high school students attending racially balanced schools was above 90 percent for all but two years between 1971 and 1988, but has fallen to only 75 percent as of 1995. *PX 2* at 6; *DX 1,* at Chart 2.

Plaintiffs' expert, Dr. Fred M. Shelley of the Department of Geography and Planning, Southwest Texas State University, evaluated whether racial imbalance in the

---

[10] Dr. Shelley considered schools with African American student populations above 40 percent to be "racially unbalanced". *PX 2* at 5. As of 1995, 17 Hillsborough County public schools could be identified as racially unbalanced under this definition. *Id.* at 5-6.

Hillsborough County schools can be attributed to natural demographic change in the county. *See generally PX 2.*[11] Defendants' expert witness, Dr. William A.V. Clark, opined that demographic change in Hillsborough County has "made it impracticable or impossible to make further attendance zone adjustments in order to maintain racial balance [i.e., black student enrollments below 40 percent]" in all of Hillsborough's public schools. *DX 2* at 9.[12] Dr. Shelley, who was qualified as an expert in the fields of demography and political geography,[13] concluded that additional factors must be "consider[ed] ... before one can conclude without ambiguity that [racial] imbalance is caused only be natural demographic changes." Shelley, Tr. II at 66.

Half of the boundary changes implemented by the Hillsborough County School Board between 1977 and 1995 maintained or exacerbated racial imbalance in the Hillsborough County schools. Tr. IV at 41-42; *PX 2; PX 4.* Dr. Shelley analyzed the changes in attendance boundaries, as

---

[11] *See also* Tr. II at 34-35 ("I was retained to consider the question of the extent to which increases in identifiable racial imbalance in the public schools in Hillsborough County could be attributed to natural demographic change").

[12] On cross-examination, Dr. Clark admitted that he has never testified in a unitary status proceeding for any party other than a school system or school board seeking unitary status, Tr. II at 71. Dr. Clark also admitted that his conclusion in unitary status proceedings concerning the DeKalb County, Georgia; Muscogee County, Georgia; Oklahoma City; Oklahoma; and Dallas, Texas public school systems was, in every case, that demographic change was a greater factor than any action or omission by school officials. *Id.* at 65-72.

[13] Tr. Vol. II, at 34.

reported in the Race Ratio Trends reports produced by the Hillsborough County School Board *(PX 4)*, for 17 Hillsborough County schools which have more than 40 percent African American student enrollments.[14] Dr. Shelley was thus able to determine whether boundary changes implemented by the School Board between 1977 and 1995 in these 17 schools resulted in an increase or decrease in the African American student enrollment of those schools. Tr. IV at 38-39; *PX 2* at 20. For purposes of this analysis, Dr. Shelley considered changes in the boundaries of the school attendance areas for the 17 racially identifiable schools which occurred between 1977 and 1995, as reported by the Hillsborough County School Board in the Race Ratio Trends Report. Tr. IV at 38-39, 42; *PX 2*, at 1, 9, 20.

According to Dr. Shelley, only 16 of the 32 boundary changes implemented by the defendants in the 17 racially unbalanced schools between 1977 and 1995 had the effect of alleviating racial imbalance. Tr. IV at 41-42. Dr. Shelley found that only one of three boundary changes implemented for Cahoon elementary school alleviated racial imbalance in that school. Tr. IV at 39; *PX* 2 at 20. Only two of the four boundary changes implemented for the Clair Mel and Witter schools, respectively, alleviated racial imbalance in those schools. Tr. IV at 40-41; *PX 2* at 20. The boundaries for De Soto, Edison, and Sulphur Spring schools each changed one time during the relevant period, and the change did not reduce

---

[14] The 17 schools included in Dr. Shelley's analysis were Cahoon, Clair Mel, Cleveland, DeSoto, Edison, Foster, Graham, Mort, Oak Park, Robles, Shaw, Sulphur Springs, West Tampa, and Witter elementary schools, and Dowdell, Sligh, and Van Buren junior high schools. *PX 2* at 5-6.

racial imbalance in any of the three schools. Tr. IV at 40-41; *PX 2* at 20. Only two of the five boundary changes implemented for Mort elementary school alleviated racial imbalance in the student population of the school. Tr. IV at 40; *PX 2* at 20. Shaw Elementary and Dowdell Junior High Schools each had two boundary changes during the relevant period, and Dr. Shelley found that only one of the changes for each school reduced the racial imbalance of their student enrollments. Tr. IV at 41; *PX 2* at 20. Only one of the three boundary changes implemented for Van Buren reduced the racial imbalance of the school. Tr. IV at 41; *PX2* at 20. In only four of 17 schools -- Cleveland, Graham, Oak Park, and Sligh -- did all of the boundary changes implemented by the defendants reduce racial imbalance. Tr. IV at pages 40-41 and *PX* 2 at 20.

Special assignments of students to the Hillsborough County schools have had the effect of disproportionately increasing the percentage of African-American children attending racially imbalanced schools. Tr. IV at 37; *PX 2* at 10-11, 21. Dr. Shelley analyzed data included in the Fifth Annual Report of the Hillsborough County Schools concerning student special assignments *(PX* 6), and determined that "[s]pecial assignments had little impact on race ratios in a large majority of Hillsborough County elementary schools." *PX 2* at 10. The exceptions to this rule, however, were the schools with African American student populations in excess of 40 percent.

"The result of special assignments as practiced [in Hillsborough County] has been an increase in African-American percentages in schools that are already unbalanced." *PX* 2 at 11. Seven of the nine schools (or approximately 77

percent) were among the 17 racially identifiable Hillsborough County schools. Tr. IV at 44-46; *PX 2* at 10-11, 21; *PX* 6. "In each case, the impact of special assignment was to increase that school's African-American student percentage." *PX2* at 10. Defendants did not rebut this testimony by Dr. Shelley.

Plaintiffs demonstrated that racially imbalanced schools are far more likely than other schools to be overcrowded in relation to their Florida Inventory of Schoolhouse ("FISH") capacities. Tr. IV at 37, 46-50; *PX 2* at 11-13, 22-23. Every elementary school with an African American student population of 40 percent or more currently exceeds its FISH capacity. Tr. IV at 49-50; *PX 2* at 12, 22. Ten of fourteen racially identifiable elementary schools -- or 71 percent of such schools -- had enrollments 25 percent above FISH capacity in 1995/96. Shelley Tr. IV at 48-49; *PX 2* at 12, 22-23. By comparison in the same year, only 24 percent of the racially balanced elementary schools (21 of 88) had enrollments 25 percent or more above their FISH capacities. Shelley Tr. IV at 49; *PX 2* at 22-23. Therefore, "although less than 14 percent of all elementary schools in Hillsborough County were overcrowded" more than one-third of the County's overcrowded schools in the 1995-96 school year were racially unbalanced schools. *PX 2* at 13.

The most striking example of the relationship between racial imbalance and overcrowding in Hillsborough County is Edison Elementary School, which currently has an actual student enrollment 84 percent above the FISH capacity of the school. Tr. IV at 50; *PX 2* at 13. In 1977-78, when Edison's enrollment was almost evenly divided between Black and white students, the school was about 11 percent above its FISH capacity. *PX 2* at 13. By the 1995-96 school year, the

percentage of African American students enrolled at Edison had risen to 77 percent, and the school was more than 83 percent above its FISH capacity by 1995-96. *PX 2* at 13.

Defendants' expert, Dr. William A.V. Clark, did not study whether there were differences between the enrollment density of the racially imbalanced schools in the Hillsborough County school system and other Hillsborough County schools. Tr. II, at 87. Consequently, Dr. Shelley's findings concerning the overcrowding of racially imbalanced schools were not rebutted by the defendants.

Dr. Shelley found a wide variation between the percentage of African American children residing in the attendance areas of the 17 racially identifiable schools in Hillsborough County and the African American student enrollment of these schools. Tr. IV at 50-56; *PX 2* at 14-16, 24-25. Dr. Shelley also found that there was a dramatic increase in the range of disparities between the percentage of African American children residing in these attendance areas and the African American student enrollment of these schools. Tr. IV at 57-58; *PX 2* at 24-25. According to Dr. Shelley, "disparities between the percentage of African-Americans in schools and those in the general population [of the school's attendance zone] should, be consistent across schools at any given point in time absent, clear evidence that birth rates or other factors affecting the overall population differs substantially from one place to another." *PX 2* at 15.

The inconsistent pattern of disparities between school enrollment and surrounding attendance zones suggests that natural demographic change does not fully account for the increasing racial imbalance of the Hillsborough County

schools. *PX 2* at 16. Immediately after the 1971 Order took effect, the disparity between the African American population 0-17 years of age in the attendance areas of the subject schools and the enrollment of those schools ranged from 10 to 17 percent. By 1980, the disparity ranged from four to 24 percent, and by 1990, the disparity ranged from -1.5 percent to 28 percent. Tr. IV at 57-58; *PX 2* at 15-16, 24-25. Dr. Shelley concluded that it was difficult to attribute this degree of disparity solely to natural demographic change. Tr. IV at 56; *PX 2* at 16, 24-25.[15]

Hillsborough County is less racially segregated today than it was in 1970. Tr. IV at 59-60. The number of Census tracts with African American populations of 95 percent or more fell from seven in 1970 to two in 1990. Tr. IV at 61; *PX 2* at 18. At the same time, the number of Census tracts with 25 to 50 percent African American population more than doubled between 1970 and 1990. *Id.* at 61, lines 14-16; *PX 2* at 18.

---

[15] Dr. Clark testified that "the most obvious" explanation for a disparity between the racial composition of the school-age population of an attendance zone and the actual school enrollment "is that some of the white children who are living in there ... are going to parochial or private schools." Tr. Vol. II, at 55 (Clark). *See also id.* at 45 ("[I]n general we might expect the black enrollment to be higher than the proportion in the neighborhood because [of], for example, children going to parochial and private schools"). Dr. Clark admitted, however, that he does not "know the degree of the impact" of private or parochial school enrollments upon the disparity between attendance zone populations and school enrollments, and he did not conduct an analysis which would allow him to quantify or estimate this impact. Tr. Vol. II at 88-89 (Clark). Consequently, Dr. Clark's opinion on this matter should be accorded little or no weight.

The attendance areas for Cleveland, Edison, Graham, Robles, and Oak Park elementary schools are not adjacent to each another. Rather, these attendance areas are geographically dispersed. Tr. IV at 62-63; *PX 2* at 18-19.

Based upon the degree of racial integration of Hillsborough County's residential areas, the relatively small growth of the African American population (including the school-aged population) county wide, and the dispersion of the attendance zones of the five elementary schools with the longest history of student enrollments above 40 percent African American, Dr. Shelley concluded that boundary adjustments may be able to alleviate the racial imbalance of these schools. Tr. IV at 58-64; *PX 2* at 18-19.

There is no empirical support for Dr. Clark's conclusion that the Hillsborough County School Board could not have undertaken additional efforts to counteract the impact of demographic change on the racial composition of the schools. Tr. II at 60-64. While Dr. Clark referred to an analysis of "white flight" which he performed in another case during his trial testimony, *id.* at 63-64, he conceded that he did *not* conduct such an analysis in this case. *Id.* at 97. Thus, Dr. Clark's opinion that further adjustment of attendance zone boundaries by the Hillsborough County School Board would have deleterious effects system wide is entitled to no weight.

Even Dr. Clark concedes that there is no available data which would permit assessment of demographic change after 1990. Tr. II at 14. Therefore, the impact of the various changes made pursuant to the 1991 *Consent Order* cannot be adequately measured for two reasons. First of all, nine of the racially identifiable schools have not come on line yet. Tr. I

at 96. Second, the extent of demographic change cannot be determined until after the census in the year 2000. While the unavailability of updated population data would not ordinarily be given consideration in a school desegregation case, such consideration is appropriate here, given the massive change in the student assignment system undertaken by the defendants since 1991.

The *Report and Recommendation* find defendants unitary in the area of faculty and staff assignment. The evidence suggests defendants have not eliminated the vestiges in this area. The July 1971 *Order* states that:

> Principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. Such personnel shall be assigned so that the ratio of black to white teachers in each school, and ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

July 1971 *Order* at 10. This provision of the *Order* contemplates the inclusion of faculty and staff in the analysis and staff assignment is expressly listed as a *Green* factor. *See Green,* 391 U.S. at 435. The evidence on staff deemed unreliable in the *Report and Recommendation* is a critical component of desegregation orders in general and this desegregation order in particular.

The *Report and Recommendation* do not address the fact there is a discernible racial pattern which prevails in the case of schools with the higher percentages of black faculty and staff. Without exception, these schools have one of three categories: (1) a high percentage of black student enrollment, (2) a historically black school prior to the 1971 *Order*, or (3) a school located in the "inner city." *See PX 1i (Appendix)*[16]. All of these schools have a 10% or more deviation from the district-wide faculty and staff average. *Id.* Many of these schools have a 15% or more deviation from the district-wide faculty and staff average.

The *Report and Recommendation* do address the evidence that, at the highest ranks of the Hillsborough County school system's hierarchy, blacks have been shut out of key policy-making positions.[17] However, this evidence is dismissed as not relevant to the inquiry at hand. *See Report*

---

[16] *PX 1i* is included in the appendix to *Plaintiffs' Proposed Findings of Fact and Conclusions of Law*.

[17] No black person has ever served as Superintendent, Deputy Superintendent, Assistant Superintendent for Instruction, Assistant Superintendent for Administration and Operations, and Assistant Superintendent for Personnel and Human Resources, Assistant Superintendent for Business and Research, Assistant Superintendent for Vocational, Technical, Adult and Community Education or as Administrative Assistant to the Superintendent in the Hillsborough County school system. Tr. VII at 144-145. One Assistant Superintendent position -- and only one -- has ever been held by someone black: the position of Assistant Superintendent for Supportive Services. Tr. VII at 145-147; *see also* Tr. VI at 88-89. This position administers federal programs relating to inner-city school projects and the human relations program. Tr. VI at 88-89. However, none of the black persons who have served in this position have ever had the opportunity to serve in any other Assistant Superintendent capacity. Tr. VII at 146-147.

and Recommendation at 36 ("None of the Court's Orders have ever required the School Board to provide racial balance at the upper management level"). Thus, the *Report and Recommendation* deem irrelevant evidence probative of the district's treatment of staff and willingness to integrate the Hillsborough County school system at every level, contrary to the Supreme Court's commandment. *See Green,* 391 U.S. at 435 (obligation to ensure that "every facet of schools operation" is free of racial identifiability).

The *Report and Recommendation* find that defendants are unitary with respect to facilities. The legal analysis undertaken by the Court does not adequately consider the July 1971 *Order*. The Court recognized in its May 1971 *Order* that the area of facilities is a critical one:

> The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote

> segregated residential patterns, which when combined with "neighborhood zoning," further lock the school system into a mod [sic] of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

May 1971 *Order* at 31 *(quoting Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 402 U.S. 1, 20-21 (1971). The Court provided clear direction as to how to determine compliance with this factor:

> As previously ordered all school construction, school consolidation and site selection, (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure.

July 1971 *Order* at 11. Nevertheless, the *Report and Recommendation* do not base its finding on whether defendants can satisfy its burden, given the information it submitted, there is enough information the extent adequate information was presented to permit evaluation of motivations for defendants' actions, as well as the extent to which desegregation was taken into consideration, defendants' site selection policies and practices suggest that the placement and construction of new facilities have exacerbated racial identifiability. *See id.* at 42-44, 79-80.

Plaintiffs' expert, Dr. Stevens, did not find any district documentation of any of the following: reason a school site was selected, a summary analysis of the impact of a selected

site on desegregation, alternative sites considered and rejected and reasons for rejection, including consideration of alternative sites' impact on desegregation. *PX 1* at 19. Nor did defendants have not presented any information to the contrary. It is clear from the school district's own data that the closing and opening of schools did not address racial identifiability. From 1977-1995, 24 elementary schools were opened and 8 elementary schools were closed. *PX 1b; see also PX 1* at 8. Yet, during this same time period, there were 14 elementary schools which had a black population of 40% or more black. *PX 1* at 7. None of the 14 racially identifiable schools were further desegregated as a result of the opening and closing of schools. *Id.*

Furthermore, there are serious questions as to whether school site selection in Hillsborough County has exacerbated any existing segregated residential patterns and hindered further desegregation. *See PX 1* at 8-10; *see also PX 1* at 18-19. Rather than simply forgoing opportunities for further desegregation, defendants have actively promoted segregation. With few exceptions, defendants have opened new schools outside areas where there are concentrations of black students. *PX 1* at 18. Dr. William A.V. Clark, the demographer retained by the Hillsborough County School Board, acknowledged that the defendants' decision to construct a new school "in the far part of the suburbs ... would suggest they [defendants] were less concerned about keeping an integrated school system" than if defendants decided to build a school in "the center city." Tr. II at 85-86. As a consequence of this action, defendants rely on students from the satellite zones as the primary means of desegregating these schools. *Id.* Thus, the only reason that defendants can state that they have never opened a school with an all-white population is related to their

readiness to dispatch satellite students to any school built in a nearly all-white geographic area. The end result of this practice is to increase the transportation burden on these students, the vast majority of whom are black. *Id.*

Moreover, site selection in predominantly, if not exclusively, white neighborhoods, is not the only concern with regard to school construction. There is evidence that schools 20 percentage points or more above the district-wide black population are more likely to be overcrowded than other Hillsborough County schools. Dr. Shelley presented evidence that overcrowding in schools with a 40% or more black population persisted and was not likely to be addressed by new construction or the reassignment of students. *PX 2 at* 12. In the 1977-1978 school year, there were 83 elementary schools in Hillsborough County; four of these schools, Cleveland, Edison, Graham and Oak Park, had 40% or more black student populations *Id.* Two out of these four schools, Graham and Oak Park, had enrollments of more than 25% above its Florida Inventory of School Houses (FISH) capacities. *Id.; see also id.* at 23. Of the 79 schools which had a black population of less than 40% black, only six schools had enrollments of more than 25% above FISH capacity. *Id.; see also id.* at 23. In the 1995-1996 school year, out of a total of 102 elementary schools, there are fourteen elementary schools with a 40% or more black population. *Id.* The vast majority of these 40% or more black student schools -- ten -- are overcrowded, with half of the ten schools being more than 50% above FISH capacity. *Id.* at 12-13; *see also id.* at 23. Of the 88 elementary schools with less than 40% black student population, only 21 were overcrowded, with little more than one-third of the twenty-one being more than 50% above FISH capacity. *Id.* at 12-13; *see also id.* at 23. In essence, although only 14% of all

elementary schools in Hillsborough County can be considered to be overcrowded, according to FISH capacity, more than one-third of those schools with a 40% or more black student population are overcrowded. *Id.* at 13; *see also id.* at 23.

Defendants failed to provide pertinent data necessary to meet their burden of demonstrating that the system has been successfully rid of all vestiges of discrimination to the extent practicable. For example, one indication of whether the school district discharged its obligation relating to the satisfaction of the *Green* factor of facilities would certainly be data on capital expenditures. As part of an overall analysis on resource allocation, Defendant has included an analysis on capital expenditures. *See DX 1* at 19-20. This information is deficient in two respects. First, this information does not do an analysis of data on capital expenditures prior to the 1971 *Order,* failing to provide a suitable benchmark for this Court to determine whether there has been a significant change in the treatment of schools predominated by black students. Tr. III at 129. Second, while defendants' expert, Dr. Armor, conducted an analysis between "inner city" schools and other schools, Dr. Armor did not compare capital expenditures between schools with a greater or less than 40% black student population. Tr. III at 131. In fact, an overwhelming number of the schools included in the capital expenditure study -- eleven[18] out of twenty-one elementary schools -- are schools which are not

[18] The eleven schools are Bryan Tampa, Dunbar, Just, Lee, Lomax, Orange Grove, Potter, Progress Village, Shore, Williams, and Lincoln.

close to or a majority black. *Id.* Indeed, some of these schools are magnet schools.[19]

The *Report and Recommendation* made a finding that the defendants are unitary in the area of transportation. This finding is based on the fact that the bus burden has existed since the 1971 *Order* and was not considered a violation then.[20] *See Report and Recommendation* at 39. This analysis does not take into account whether since the entering of the 1971 *Order* there is still a need for blacks to bear *such* a disproportionate burden of the busing under the school system's desegregation plan.[21] Nor does this address whether

---

[19] The significance of placing magnet schools on the list is two-fold. First, magnet schools in the Hillsborough County school system receive additional resources, as the defendants readily concede. *See* Tr. I at 151-153. Second, magnet schools at Hillsborough County expressly limit black student enrollment to no more than 23%. *See id.* at 166-167; Tr. IV at 126.

[20] The July 1971 *Order* did state that:

> Bus routes and the assignment of students to buses will be designed to assure the transportation of all eligible students on a non-segregated and otherwise non-discriminatory basis....

July *Order* at 10.

[21] Recent data indicate that, at the high school level mean, a black student is three times more likely than a white student to be bused for desegregation purposes. See *PX 1* at 20; *see also PX If.* When the figures computing which students are bused for desegregation purposes, but do not do so voluntarily, i.e., they are not participating in a magnet school or program, black students are still more likely than white students to be "assigned" to a bus for desegregation purposes. *See id. PX 1; see also PX 1g.* At the elementary school level, black students are nearly two and one-half

there is a link between the student assignment and site selection policies of the defendants which are a contributing factor to the burden placed on black students. For example, the perpetuation of the satellite program places a disproportionate transportation burden on black students who live in the satellite areas. The logic behind the *Report and Recommendation's* finding suggests that black students can be bused at will.

The *Report and Recommendation* found the defendants unitary in the area of extracurricular activities. *Report and Recommendation* at 40-42, 77-79. The July 1971 *Order* required defendants to assure access to, and the maintenance of, extracurricular activities on a "non-segregated" and "nondiscriminatory" basis. Defendants provided little evidence to justify such a finding and the *Report and Recommendation* provides little basis for reaching this result.

In order to form an opinion as to the degree of desegregation of extracurricular activities, the following information would have to be provided: (1) activities by school, (2) sponsors and coaches by school and by race, (3) student participation by activity, by race and by school. *PX 1* at 28. These activities should include athletics, clubs and other

---

times more likely than white students to be assigned to a bus for desegregation purposes. *See id.; see also PX 1g*. At the high school level, black students are fourteen times as likely as white students to be assigned to a bus for desegregation purposes. *See id.; see also PX 1g*. There is marked increase in terms of the percentage of students assigned to a bus for desegregation purposes at the high school level. At the high school level, black students comprise nearly 80% of the students bused for desegregation purposes. *See id.; see also PX 1g*.

after-school activities. *Id.* The availability of transportation to and from these activities should also be examined.[22]

The Hillsborough County school system apparently has a broad range of extracurricular activities, including athletics, music groups (such as bands, orchestras, and choral groups, student organizations (such as the National Honor Society, drama clubs and the student council). *See PX 1* at 27; *see also* Tr. VI at 29-30. At the evidentiary hearing, defendants only presented evidence with regard to athletics. *See* Tr. I at 111-116; *see also DX 28.* Therefore, there is no basis for concluding that there are no vestiges of segregation with respect to music groups, student organizations and other clubs in the Hillsborough County school system, especially in light of compelling anecdotal testimony about a reluctance in one predominantly white school to do more about black student involvement in extracurricular activities. Tr. VI at 17-22, 27-28.[23]

The evidence with respect to athletics, which includes sports and cheerleading, is limited to one exhibit. *DX 28.* This

---

[22] As discussed above, this Court has already found that defendants have failed to show that there is adequate access to extra-curricular activities for those students -- who are disproportionately black -- who are bused to school from a satellite area.

[23] A black parent, Mrs. Mae King, testified that, when she made a suggestion about having an African-American disc jockey at a party to increase black student participation in school activities, parents walked out of the meeting. *Id.* at 19-20; *see also id.* at 52-53 (testimony of Ronnie King concerning limited involvement in and recruitment of black students for Spanish and Math Honor Societies).

exhibit provides information for the fall of 1996-1997 school year and the winter and springs of the 1995-1996 school year. Tr. I at 117. The exhibit does not provide any information prior to this time period. *Id.* at 117-118. Nor does the exhibit indicate how many students tried out for the given activity. *See id.; see DX 28.* Therefore, it is impossible to tell whether or not any of the figures represent a pattern of discrimination or exclusion. For example, for the Bloomingdale High School, there were no black cheerleaders during this time period. *Id.* at 117-118. There is no evidence that this is aberrational or that it reflects a lack of interest on the part of black girls. *See id.* at 117-118. Likewise, at Brandon High School, there was only one black cheerleader. *Id.* at 118. Again, there is no indication from this exhibit whether this is aberrational or rather, reflects a pattern of discrimination. Such information is crucial to determining whether the vestiges of segregation have been eliminated.[24] Thus, the *Report and Recommendation* should have found that defendants failed to present sufficient evidence that extracurricular activities are free of the vestiges of segregation.

The inquiry of whether a quality education has been provided, regardless of the race of the student, focuses on factors related to the prior *de jure* segregated school system. *See Missouri v. Jenkins*, 515 U.S. at ___, 132 L.Ed. 2d at 89 (Court expresses concern about "[i]nsistence upon academic goals unrelated to the effects of legal segregation"). If any so-

---

[24] Clearly, black students' opportunity to participate in cheerleading squads has been an issue throughout the school district. The issue is of such great concern that Mrs. King, testified that she got up early in the morning to monitor cheerleading tryouts at Armwood High School. Tr. VI at 26-27, 31-32.

called "external factors" affecting minority student achievement are the result of segregation, then these factors are relevant and "figure in the remedial calculus." *Id.* Testimony on quality education is in three forms: (1) evidence on resource allocation, (2) evidence on academic outcomes, and (3) evidence on the disparate impact of defendants' practices and policies affecting a student's right to a quality education, regardless of race.

On resource allocation, defendants submitted an analysis compiled by Dr. Armor. Dr. Armor conducted analyses on teacher resources, operational resources and capital expenditures. *DX 1* at 14-20. The *Report and Recommendation* found that:

> The School Board has also established that its allocation of funds and teacher resources is free from racial discrimination. Much of the budget comes from state and federal sources and the School Board is regularly audited to determine that it is in compliance with standards for use of those funds. Individual schools are funded on a per-pupil basis and the race of the student has no bearing on how funds are spent. Schools that are brought into the middle school cluster plan receive additional funds for that year. In recent years, total per capita expenditures have actually been higher at schools with a 40% or higher black enrollment.

Report and Recommendation at 79. The evidence upon which this finding is based cannot support such a conclusion.

Overall, the data on resource allocation is so deficient that it is of little probative value. This data suffers from three major deficiencies: (1) none of the data provided hereto is compared with information prior to the issuance of the 1971 *Order*, (2) only two years of data are provided and not consecutive years and (3) the analysis does not take into consideration the impact of the middle school plan. On the first matter, there can be no meaningful discussion of "vestiges" without a proper understanding of the prior *de jure* segregated school system. On the second, the quantum of data provided must be sufficiently reliable in order for this Court to provide meaningful findings of fact and issue well-informed conclusions of law. On the third and final matter, if as the defendants' expert concludes, one of the two years chosen was an atypical year, *DX 1* at 14, this fact raises a question about whether any of this data can be reliable in the midst of a tremendous overhaul of the entire school structure, as a result of the ongoing implementation of the middle school plan.

The teachers' resources information contains data on the following with respect to elementary and middle schools, not high schools: (1) the educational background of teachers, (2) the average years of professional experience for teachers in a school, and (3) pupil teacher ratios. *DX 1* at 14-15. However, the teachers' resource information includes resources, provided as a result of Chapter I funds. Chapter I funds bring significant resources based on the socioeconomic status of the students. *See* Tr. VII at 93-95. Therefore, the use of resources provided by these sources without an indication of how this support affects the amount of resources can be misleading and not a sufficiently reliable indicator of how the school district, itself, is distributing resources.

The operational expenditure analysis includes information on teacher salaries and benefits, textbooks, instructional equipment, maintenance and other categories. *DX 1* at 16-19. As a result of the use of only two years of data, a dozen schools were excluded from the analysis on supplies and equipment expenditures.[25] It is unclear what the impact is of this exclusion of data. Nevertheless, defendants chose to present a limited sample from which this Court could make findings and thus, cannot complain about their inconclusiveness.

On academic outcomes, the *Report and Recommendation* found that: "any disparity in achievement among students is not due to the effects of the prior segregated school system but rather to a myriad of other factors, largely socioeconomic." *Report and Recommendation* at 82-83. This finding is not supported by the evidence presented in this case. On academic outcomes, defendants once again rely principally on the testimony presented by Dr. Armor. Despite the existence of these disparities in student achievement between black and white students, Dr. Armor suggests that these results have no connection with the prior *de jure* segregated school system, even though Dr. Armor's analysis does not compare the current achievement rates of black and white students with the achievement rates of black and white students in the former *de jure* segregated school system. Tr. III at 119-120. The sum and substance of Dr. Armor's testimony are that the difference between white and black

---

[25] The elementary schools are Boyette Springs, Cannella, Colson, Folsom, Hunters Green Lithia Springs, Lowry, and Schwartzkopf. *DX 1* at 18, n.7. The middle schools are Coleman, Madison, Monroe, and Wilson. *Id.*

student achievement levels is "explained" almost entirely by the poverty of the students, rather than "vestiges" of the prior *de jure* segregated school system. For the reasons stated below, this additional analysis is not compelling. Dr. Armor does not analyze any information from the prior *de jure* segregated school system. Thus, this analysis draws a conclusion without complete information. This analysis cannot inform the Court on how differences in teacher expectations affected black student achievement prior to the 1971 *Order*. *Id.* at 121. Nor can this analysis preclude the possibility that part of the gap in black/white achievement explained by percentage B.A. is related to the prior *de jure* segregated school system. *Id.* at 123. If part of the gap in black/white achievement is explained by the percentage of B.A. in black families, which is related to the prior *de jure* segregated school system, then this would help explain the impact on average household income. *Id.* at 123. Thus, Dr. Armor does not account for the possibility that the differences between the academic outcomes of black and white students may be linked to the prior *de jure* segregated school system. While Dr. Armor suggests, such an inquiry is not relevant, *Id.* at 121, to conclude otherwise requires the Court to do something it cannot do: ignore the very basis for federal court supervision in the first place.

Next, Dr. Armor's use of 1990 United States Census variables, same-race percentage of B.A. degrees and the same-race average household income, with actual school data, free or reduced lunch status and one- or two-parent family status, renders suspect his analysis of the impact of socioeconomic status of the 1994 and 1995 fifth and eighth grade reading and math test-takers. First, the U.S. Census data measures the socioeconomic status of neighborhoods, not actual students.

Tr. III at 125-126; Tr. VI at 170. Second, Dr. Armor is not even measuring the socioeconomic status of the actual neighborhoods of the 1994 and 1995 fifth and eighth grade reading and math test-takers, because he relies on information from 1990, the 1990 Census, not information from 1994 and 1995. Thus, Dr. Armor is not measuring the socioeconomic status of the 1994 and *1995* test-takers.

Finally, the use of the Census data taints Dr. Armor's conclusions in another way. Dr. Armor claims to be trying to explain whether something other than race "explains" differences in test scores between black and white students. However, by using only same-race data from the U.S. Census, he is using racial data to explain away race. Tr. VI at 170-173.[26]

---

[26] In his analysis of whether socioeconomic status can "explain" the racial gap in test scores, Dr. Armor also inappropriately assumed that the relationship between socioeconomic status and academic achievement is the same for black and white school children. Tr. VI at 176-177. This assumption had the effect of overestimating the effects of socio-economic status. *Id.* at 177-78. In fact, as plaintiffs' rebuttal expert, Dr. Robert Crain showed, although academic achievement generally increases with the level of family resources for both white and black students, the relationship between the level of family resources and achievement is not the same for black students versus for white students. PX 65; Tr. VI at 181-82. In fact, when blacks of low family resources are compared to whites of low family resources or blacks of high family resources are compared to whites of high family resources, there are differences in academic achievement levels, with whites scoring higher than blacks. *See id.* Dr. Armor had not himself analyzed the significance of the difference between these relationships and thus had no basis to conclude that the difference was not significant. Tr VII at 177, 179-80.

For Dr. Armor's analysis to have its intended effect -- to prove that any differences in academic outcomes between black and white students are related solely to socioeconomic factors rather than race -- first grade test scores are critical. Tr. VII at 182-183. As discussed above and conceded by Dr. Armor, the use of the four socioeconomic variables, percentage of B.A. degrees, average household income, free or reduced lunch status, and one or two parent family information, "only explain about half of the difference" between the academic outcomes of black and white students. *Id.* at 183. Thus, in Dr. Armor's own words, "first grade scores are critical in my opinion." *Id.*

Like the inclusion of the neighborhood variables, the addition of first grade test scores to Dr. Armor's analysis compromises the quality of the results obtained. First grade test scores are not a purely socioeconomic factor, like free or reduced lunch or one or two parent families, or educational level or income. Dr. Robert Crain, plaintiffs' expert, argued that first grade test scores are an important measure of what a student knows about reading at the end of the first grade year, particularly since testing occurs in the spring after students have already had significant opportunities to develop skills. Tr. VI at 283, 253. If the Hillsborough County school system wanted to measure the "initial skills" of first graders, then it would have tested them upon entry into school, rather than after several months of schooling. Even Dr. Armor concedes that enough learning occurs in the first grade to increase IQ levels and improve cognitive skills, Tr. VII at 186-187. Clearly, a measure of how much a child has learned during a given period of school attendance is not a pure measure of a socioeconomic factor.

In fact, the use of first grade test scores as part of the academic achievement analysis begs the ultimate question at issue. Dr. Armor claims to be explaining that differences in the scores between black and white students are not linked to differential treatment of black and white students in the Hillsborough County school system. *See DX 1* at 20 ("other qualitative differences in curriculum or in teaching practices" may be "responsible for outcome differences such as test scores ...."). Nevertheless, by relying on first grade test scores from the Hillsborough County school system, Dr. Armor relies on factors *within* the control of the Hillsborough County school system to "explain" away whether or not these test scores are within the control of the Hillsborough County school system. In essence, his analysis leads the Court right back to the very question it posed to the parties: whether or not the vestiges of *de jure* discrimination have been eliminated in the Hillsborough County schools. Thus, Dr. Armor's analysis of academic outcomes does not demonstrate that any difference in academic outcomes between black and white students in Hillsborough County is the result of socioeconomic status, given the issues raised about the methodology.

On the third area in quality education, the evidence is suspension data, participation in the gifted program and drop out rates. The factor of suspension rates is included because it is an indicator of school treatment of black and white pupils. Tr. IV at 146-147. Gifted programs were included because these programs are popular programs with parents and, therefore, access to these programs for black students would be important. *Id.* at 147. Drop out rates indicate the rate at which black students are finishing school in proportion to their presence in the school district. *Id.* at 148.

The data indicates that black students are over represented in terms of suspensions and drop out rates, but under represented in terms of participation in gifted programs. *See id.* at 142-148. The suspension statistics indicate a particularly bleak reality for black students in Hillsborough County. In the area of suspensions, at all levels of the school system, black students are suspended at a far greater rate than white students. *PX 1* at 28; *see also* Tr. IV at 143-144. For the 1994-1995 school year, half of the black students at the middle school level received a suspension of some form. *PX 1* at 29; Tr. IV at 146.[27] This figure was twice as much as the rate of white students. *Id.* Of the black middle school students who received some form of suspension, the vast majority received out-of-school suspension, which means that instructional time was lost. *PX 1* at 29-30. In short, black students in Hillsborough County are losing more instructional time than white students as a result of the rate of suspensions. Defendants presented no witness to address these alarming suspension rates.

As a result of the foregoing, it is clear that the evidence in the record did not exist to support a *Report and Recommendation* finding that defendants were unitary with respect to quality education. Defendants have not presented sufficient data on resource allocation nor have they demonstrated that any differences in academic outcomes, such as test scores and suspension rates, are not linked to the prior *de jure* segregated school system. Under these circumstances, the elimination of racial discrimination in the area of quality

---

[27] The Hillsborough County school system has two forms of suspension, in-school and out-of-school suspension. *See PX 1* at 29-30.

education has not been established and a declaration of unitary status in this area is not appropriate.

III. PLAINTIFFS OBJECT TO THE REPORT AND RECOMMENDATION FINDING THAT DEFENDANTS HAVE COMPLIED IN GOOD-FAITH WITH THIS COURT'S ORDERS

Analysis of the *Green* factors is only one part of a two-part test. "The District Court should address itself to whether the Board has complied in good faith with the desegregation decree since it was entered...." *Dowell*, 498 U.S. at 249-50. *See also Freeman,* 503 U.S. at 499 (Defendants have "an affirmative commitment to comply in good faith with the entirety of a desegregation plan"). The *Report and Recommendation* find that:

> The School Board has complied in good faith with this Court's desegregation orders for quite a long period of time. The testimony of the [sic] most School Board members, as well as the current Superintendent and those responsible for various facets of school operation demonstrates that defendants have accepted the principle of racial equality and will not revert back to a dual school system.

Report and Recommendation at 86. This finding is totally at odds with the evidence presented in this case. The *Report and Recommendation* cannot measure good-faith compliance when the 1991 *Consent Order* has not yet run its course. Indeed, given the applicable law in this area, all the evidence suggests that the requirement of good-faith compliance cannot be met.

"A finding of good faith ... reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual." *Morgan v. Nucci,* 831 F.2d 313, 321 (lst Cir. 1987). The defendant school district must demonstrate "to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance." *Freeman,* 503 U.S. at 491. There is no basis for a conclusion that defendants have demonstrated to the "disfavored race" their good-faith commitment. In fact, the record evidence overwhelming demonstrates that the black community in Hillsborough County has little faith in the defendants.

Plaintiffs called eight black residents of Hillsborough County to testify at trial: Mrs. Doris Reddick, a member and then-Chair of the Hillsborough County School Board and defendant in this case[28], Mrs. Ann Porter, President of the

---

[28] Significantly, although she was a defendant in this case, Mrs. Reddick testified that the Hillsborough County school system was not ready for unitary status. Mrs. Reddick is the only member of the Hillsborough County School Board who attended the all-Black public schools of the *de jure* segregated Hillsborough County school system. She testified about the inadequate and inferior facilities and equipment that she encountered as a Black student in the Hillsborough County schools. Tr. V at 21-23. "There were no ... kindergartens during that time for black children ... [and] sometimes not enough books for the children, and I also remember that some of the pages would be torn out, some of the covers or backs would be missing from the books.... [A]ll of the teachers ... [and] all of the children were black. There was no lunchroom at either of the schools that I was in." Tr. V at 21-22. Mrs. Reddick attended high school in an elementary school building, which "was not equipped with anything that a high school should have had for

Tampa Branch of the National Association for the Advancement of Colored People (NAACP[29]), Mrs. Joanna Tokely[30], President of the Tampa Branch of the Urban

---

children." Tr. V at 23.

Mrs. Reddick testified that she does not believe that the Hillsborough County School system should be released from court supervision. Tr. V at 25, 30-31. As she explained:

> I am not sure we have actually crossed over the wall, and I mean the wall of equal distribution of everything that the unitary system calls for.
>
> Also, I know that history has a way of repeating itself, and I am reluctant to have us released now, Your Honor, and any other time that I see in the future.

Tr. V at 30.

[29] Through the NAACP chapters' Education Committee, Mrs. Porter is knowledgeable about complaints filed with the organization by black parents with children in the Hillsborough County public schools. Mrs. Porter testified that the Tampa Branch NAACP has received complaints during the past several years concerning various racially discriminatory actions and practices within the school system. She specifically identified employment discrimination in the school system and discriminatory special education placements as issues that have generated complaints to the NAACP in recent years. Tr. VI at 139, 141-43.

[30] On the basis of her experiences as an employee of the Hillsborough County public schools, her work with the Tampa Hillsborough Urban League, and her involvement as a parent, grandparent and godparent of Hillsborough County public schools students, Mrs. Tokley opposes the termination of federal court supervision of the Hillsborough County public schools. She testified about numerous situations or conditions which contribute to her feeling that "the school system is not ready" to be declared unitary yet. Tr. III at 187. *See generally id.* at 179-81, 188-89, 208-09.

League, Mrs. Mae King[31], a parent, Ronnie King II[32], a

One of the more recent (and graphic) examples of this which Mrs. Tokley testified about was a 1995 high school basketball game where some spectators began to yell racial epithets after her godson scored enough points to bring his team into the lead. Tr. III at 181, 208-09. No action was taken to stop this discriminatory conduct. *Id.* at 208-09. In addition, Mrs. Tokley testified that the school system's hiring and promotion of African Americans remains a matter of great concern and "is always" raised in meetings between the Superintendent and African American community representatives. Tr. III at 192-93.

[31] Mrs. Mae King is the mother of two children who attend Hillsborough County public schools. Tr. VI at 11. Mrs. King's daughter, Veronica, is a fifth-grader at Limona Elementary School and her son, Ronnie, is in the eleventh grade at Armwood High School. Tr. VI at 11. Mrs. King testified about several specific incidents which have caused her to believe that it is premature to terminate federal court supervision and grant unitary status in Hillsborough County. Tr. VI at 13-21, 26-28, 30-31, 37-40. For example, she described the physical separation of inner-city, black children from their classmates as they arrived at Limona each morning. Tr. VI at 16-17. Mrs. King also described an incident where black children were waiting on a long line to enter Limona's cafeteria to eat breakfast, and a "white child came up to the end of the line and a teacher escorted th[e] white child to the front of the line." Tr. VI at 35, 37. Mrs. King also expressed concerns about black students' limited participation in extracurricular activities at Armwood, and questioned whether school officials are sufficiently responsive to such concerns. Tr. VI at 18-21. Mrs. King was a student herself at the beginning of desegregation. Consequently, she "has never felt a part of the school" that she attended and has never been invited to a class reunion. She testified that she "just cannot sit back and allow [her] child to be educated in a system where he graduates ... and never feel[s] a part [of the school]." Tr. VI at 28.

[32] Ronnie King, a 16-year-old member of Armwood High School's class of 1998 testified concerning his experiences as an African American student in the Hillsborough County public school system. Tr. VI at 41-56. His current courses include gifted level mathematics, science, history, and English classes. He is the only

student, Mr. Darrell Daniels[33], a parent, Dr. Sam Horton[34],

---

Black student in each of these classes. Tr. VI at 44. While he acknowledges the difficulties of being in such an extreme minority in most of his classes and activities, Ronnie nevertheless feels that his presence helps to counteract stereotypes:

> [I]n my classes they have this image of blacks just being ... athletes.... And at least they're able to see one face ... [and] they [can] say, Well, you know, this is a black student ... that plays sports and has good grades, you know.

Tr. VI at 49.

[33] Darrell Daniels, an African American parent of two children who attend Hillsborough County public schools believes that federal court supervision of the desegregation of Hillsborough County schools should not be terminated yet. Tr. VI at 57-79. Daniels' 10-year-old son, Brandon, is in the fourth grade at Robles Elementary School. His 8-year-old son, Dominique, is in the third grade at Foster Elementary School. Tr. VI at 57-58. His fiancee's children attend Essrig Elementary School. Tr. VI at 59. When asked to compare Robles to Essrig, Mr. Daniels stated that the two schools were like "night and day." Tr. VI at 59-60. The Robles student body is 91 percent African American, while only 16 percent of the children enrolled at Essrig are African American. PX 4 at 3, 5. He testified that, "if [he] had a choice", he would prefer for his son to attend a different school than Robles. Tr. VI at 60. His specific concerns are that fewer resources are available at Robles, and that the staff of many inner-city schools discourage parental involvement and do not have the same commitment to education as the staff of suburban schools and schools with larger white student enrollments. Tr. VI at 59-60, 63-67, 70-72, 76-77.

[34] Dr. Sam J. Horton was employed by the Hillsborough County school system for more than 42 years. Tr. VI at 80. He retired in 1991 after 14 years of service as General Director of Secondary Education for the Hillsborough County schools. *Id.* Between 1950 and 1977, Dr. Horton worked as a teacher, assistant principal, or principal in five different Hillsborough public schools. Tr. VI at 84. Dr. Horton attended segregated public schools in

a former Hillsborough County school system employee and Minister Andrew Manning[35], the named plaintiff in this action.

Hillsborough County. Tr. VI at 95. Dr. Horton was the first -- and last -- African American to serve as General Director for Secondary Education in the Hillsborough County school system. Tr. VI at 88. Throughout his 42 years of service with the Hillsborough County school system, only one position at the Assistant Superintendent level was ever occupied by an African American -- the position of Assistant Superintendent for Support Services. Tr. VI at 88. In the years since Dr. Horton's retirement, Assistant Superintendent for Support Services remains the only position at the Assistant Superintendent level that is held by an African American. TR. VI at 89. Dr. Horton sought the Assistant Superintendent for Instruction position twice. Tr. VI at 89. He did not believe that the position was ever "advertised in a bulletin or nationally or that kind of thing," Tr. VI at 90-91, and he described a very informal hiring process where "you know that the vacancy exists", and then simply notify the Superintendent of your interest in the position. *Id.* Both times that Dr. Horton sought the Assistant Superintendent for Instruction position, he was passed over, and whites were hired instead. Tr. VI at 89-94.

On the basis of his experiences as a student and employee of the Hillsborough County public schools, and as an educator, Dr. Horton has "very serious concerns" about the termination of federal court supervision. Tr. VI at 96-97. He is concerned that some Hillsborough County schools "have the potential of re-segregating themselves ... [or] becoming ... one-race" Tr. 96-97, 99. He fears that termination of the desegregation order "might rob [Hillsborough County's] children of the chance to enjoy and practice the diversity" of the larger society. Tr. VI at 97-98. Finally, he is concerned that the current desegregation plan is too dependent upon specialized programs, which are more expensive, and therefore are easy targets when budgets tighten or shrink. Dr. Horton testified that "if history repeats itself, those schools that are predominantly black ... will not get adequate resources to maintain that program." Tr. VI at 98.

[35] Minister Andrew Manning was a fourth grade student at Dunbar Elementary School in 1958 when his

Each of these witnesses testified that the court-monitored school desegregation should continue. Each of these witnesses expressed concern about the educational opportunities that would be available to black students in the Hillsborough County public school system if federal court supervision is terminated and unitary status is granted. In contrast, defendants failed to call a single black witness in support of the proposition that the black community is satisfied with the commitment shown by defendants to their interests, even one of their own School Board members. This evidence undercuts the argument that the "principle of racial equality has been accepted by defendants. In fact, it suggests a significant degree of racial polarization and isolation inconsistent of the type of evidence indicative of a lack of good faith. *See Green,* 391 U.S. at 442 (not a racially divided district "but just schools").

---

mother, Mrs. Willie Mae Manning, began this litigation. Tr. VI at 104-05. At the time, both the students and faculty of Dunbar were all-black. Tr. VI at 106. Dunbar was a "very crowded" school, with "limited equipment" and "old" textbooks. *Id.*

Minister Manning testified that, from his perspective, the objective of the litigation was to gain access to "a quality education." Tr. VI at 108. Even after his graduation from the Hillsborough County public school system, Minister Manning remained interested in and involved with the lawsuit. Tr. VI at 112. He is concerned that black students have borne most of the burden of implementation of the desegregation order. Tr. VI at 114-17. Nevertheless, Minister Manning does not believe that federal court supervision of the Hillsborough County school system should end now. Tr. VI at 115-17. He believes that the schools "have not completely eliminated the vestiges of segregation, and he "feel[s] that there is a distrust in the black community ... [and] unhappiness with the School Board" which must first be addressed. Tr. VI at 113, 115.

Other evidence raised questions about how defendants carried out their obligations under court decrees. Defendants do not engage in an affirmative marketing efforts for the m-m program. *See* Tr. I at 87-93. Yet, defendants clearly know how to engage in such a program, given the extensive recruiting efforts for magnet schools. Tr. I at 145-150.[36] Defendants know the rules for special transfers, such that they deem it inappropriate not to deny special transfers, even though special transfers may further segregate a school. *See PX 6.* Yet, Dr. Miliziano, the school official with the most significant day-to-day responsibilities for school desegregation, testified as to not realizing until recently that the m-m transfer program is applicable to the district's current situation. Tr. I at 91-92. The magnet program makes special efforts to recruit minority students, but then limits the access of black students to magnet programs to levels below those promised. *See PX 1c.* Furthermore, defendants have included a document entitled "Position Statement" in its reports to the Court, which states as follows:

> It is the position of the School Board of Hillsborough County to maintain as closely as possible enrollments at schools within or close to the capacity of the school, and to maintain a race ratio which is in keeping with the Federal desegregation order.

---

[36] Defendants, *inter alia,* send out letters to every student in the Hillsborough County school system who is eligible to participate in the magnet program, and place radio and newspaper advertisements, paying special attention to media outlets with a predominantly black audience. Tr. I at 145-150.

This is accomplished in one of two ways:

1. When new schools are opening, boundaries, are drawn in such a way that a sufficient enrollment and race ratio is included at the new school and surrounding schools which are overcrowded or out of balance as to race ratios.

2. When overcrowding conditions are found at existing schools *and/or a race ratio significantly deviates from the desegregation plan,* the School Board is asked to make boundary changes to accommodate enrollments and race ratios.

Before boundaries are approved by the Board, community input is sought, and all actions of the Board regarding boundaries are reported to the Federal District Court.

DX 7 at Appendix A-4 of the First Annual Report. This statement clearly indicates that defendants will take action to address any school with a "race ratio significantly deviat[ing] from the desegregation plan." *Id.* Having reported this position to the Court for four consecutive years, Tr. VII at 225-226, defendants now take the position that this statement was not a real policy of the Hillsborough County school system. *Id.* at 210-214. Defendants also suggest that this position was never really Board policy, although it was

reported to this Court as such, but rather was merely the personal statement of Dr. John Miliziano. *See id.* at 224-225.

Unfortunately, one of two things must be true and neither are consistent with defendants' good-faith obligation: (1) defendants submitted a statement purporting to be the position of the Hillsborough County School Board and that was not the case or (2) defendants submitted a position statement to this Court which was, in fact, the position of the Hillsborough County School Board, but now in the midst of litigation, have now decided to disavow that position. Either way, these statements are not only inconsistent with defendants' good-faith obligation, but must be viewed as an affirmative act of bad faith.

The testimony of Dr. John Heuer leads to further doubt about defendants' representations to this Court. From 1963 to 1982, Dr. Heuer served as the director of pupil administrative services for the Hillsborough County school system. Tr. VII at 8. In this capacity, he had the responsibility of implementing defendants' school desegregation plan, including participating in the submission of plans and annual reports to the Court. *Id.* at 9-10. In carrying out his duties, Dr. Heuer testified, that in part, he was guided by an ex *parte* comment made by this Court about what to do about increasing racial identifiability. *See id.* at 17-19 ("we felt that what he explained to us is we were not required to go back and make a change because we hadn't created the problem initially"). Yet, at no time, did he make an effort to make these comments known to the public, the Bi-Racial Committee or distributed in writing to someone in the school system. *Id.* at 41-42. Despite the existence of two very clear and extensive court orders issued in May and July of 1971, it is Dr. Heuer's

testimony that major decisions about school desegregation are based on one-time conversations, which are not clearly articulated and memorialized in court orders. Nothing could be more inconsistent with defendants' good-faith obligation.

Based on the foregoing, the finding in the *Report and Recommendation* that defendants have complied in good-faith with this Court's orders must be rejected.

IV. PLAINTIFFS OBJECT TO THE *REPORT AND RECOMMENDATION* FINDING THAT PLAINTIFFS' *MOTION TO ENFORCE ORDER* SHOULD BE DENIED

The *Report and Recommendation* finds that:

> Plaintiffs have only once alleged that defendants violated this Court's orders, in 1994. Those allegations were fully addressed in the Prior Report and Recommendation dated June 23, 1995 and the proposed findings and conclusions made therein are incorporated here by reference.

Report and Recommendation at 63. Plaintiffs object to this finding and the underlying finding in the previous Report and Recommendation on the basis that the Court's ruling was based on defendants' not having an affirmative constitutional obligation to desegregate to the extent practicable. Furthermore, this finding suggests that, under the 1991 *Consent Order,* plaintiffs have no right to address any problem with the implementation of the middle school plan, including the basic obligations imposed by this Court's 1971 *Order* and

the Constitution. The law does not provide any support for this proposition.

As stated above, where plaintiffs have alleged violations under this Court's 1971 *Order* and the 1991 *Consent Order,* the resolution of any alleged violation does not turn on whether plaintiffs have complained, but rather, whether defendants have acted in a constitutionally appropriate manner. To the extent that the *Report and Recommendation* apply a different standard in this inquiry, these findings are erroneous. Thus, plaintiffs' motion should not have been denied. The Magistrate Judge imposed a standard at odds with school desegregation law and such a standard is not entitled to any deference from this Court in reviewing the *Report and Recommendation.*

V. PLAINTIFFS DO NOT OBJECT TO THE IMPOSITION OF A TRANSITION PHASE IN THIS CASE

While ordinarily a transition phase is not necessary, if a school system is found to be unitary, plaintiffs contend that such a transition period would be appropriate in this case.[37] The existence of the 1991 *Consent Order* necessitates such a transition period. For purposes of this case, a transition phase would serve the useful purpose of guaranteeing that the protections provided to plaintiffs under this decree remains

---

[37] Obviously, plaintiffs steadfastly maintain that any discussion of a transition phase suggests that unitary status is appropriate in this case. Plaintiffs do not and cannot agree with this proposition. As stated above, there is ample evidence in the record to demonstrate that unitary status is not appropriate at this time.

legally in effect in order to permit an orderly resolution to the case. However, such a resolution must delineate the nature and scope of the rights of the parties under such an arrangement. Otherwise, plaintiffs would have a right without a remedy.

Conclusion

For the foregoing reasons, plaintiffs object to the *Report and Recommendation* of the Magistrate Judge and urge the Court to reject the findings discussed herein.

Respectfully submitted,

Elaine R. Jones
Director-Counsel
Victor A. Bolden
Jacqueline A. Berrien
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Fl.
(212) 219-1900

Attorneys for plaintiffs

Warren Hope Dawson
1467 Tampa Park Plaza
Tampa, Florida 33605
(813) 221-1800
Fla. Bar No. 103926

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Plaintiffs' OBJECTIONS TO THE REPORT AND RECOMMENDATION AND BRIEF IN SUPPORT OF PLAINTIFFS' OBJECTIONS, have been served by depositing the same in the United States mail, first class postage prepaid, on this October 10, 1997, addressed to the following:

W. CROSBY FEW
FEW & AYALA
Suite 202
109 N. Brush Street
Tampa, Florida 33602

THOMAS M. GONZALEZ
THOMPSON, SIZEMORE & GONZALEZ
Suite 200
209 N. Brush Street
Tampa, Florida 33601

/s/_____
VICTOR A. BOLDEN

Supreme Court, U.S.
FILED
AUG 7 2001

No. 00-1871

IN THE

Supreme Court of the United States

ANDREW L. MANNING, *et al.*,

Petitioners,

v.

THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly Board of Public Instruction of Hillsborough County, Florida), *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

ELAINE R. JONES
DIRECTOR-COUNSEL

NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013-2897
(212) 965-2259

WARREN HOPE DAWSON
DAWSON LAW OFFICE
1467 Tampa Park Plaza
Tampa, FL 33605
(813) 221-1800

VICTOR A. BOLDEN
(Counsel of Record)
JESSE M. FURMAN
KENNETH D. HEATH
WIGGIN & DANA
One Century Tower
265 Church Street
New Haven, CT 06508-1832
(203) 498-4400

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THIS COURT SHOULD REVIEW THE ELEVENTH CIRCUIT'S HOLDING ON "SUBSTANTIAL CAUSE" 1

II. RESPONDENTS' FAILURE TO ASSURE GOOD-FAITH COMPLIANCE IS PROPERLY BEFORE THIS COURT 5

III. THIS COURT SHOULD REVIEW THE ELEVENTH CIRCUIT'S DEPARTURE FROM THE "CLEARLY ERRONEOUS" STANDARD 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases Page

Board of Educ. v. Dowell, 498 U.S. 237 (1991) 5

Brown v. Board of Educ., 978 F.2d 585 (10th Cir. 1992) 2, 5

DeLeon v. Strack, 234 F.3d 84 (2d Cir. 2000) 6

Dowell v. Board of Educ., 8 F.3d 1501 (10th Cir. 1993) 5, 7

Freeman v. Pitts, 503 U.S. 467 (1992) 4, 5

Grassia v. Scully, 892 F.2d 16 (2d Cir. 1989) 6

Jenkins v. Missouri, 122 F.3d 688 (8th Cir. 1997) 2

Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973) 2

Lockett v. Board of Educ., 92 F.3d 1092 (11th Cir. 1996) ..... *passim*

Lockett v. Board of Educ., 111 F.3d 839 (11th Cir. 1997) ..... *passim*

Rainbow Tours, Inc. v. Hawaii Joint Council of Teamsters, 704 F.2d 1443 (9th Cir. 1983) 3

TABLE OF AUTHORITIES – Continued

Page

Royal Crown Co. v. Coca-Cola Co., 887 F.2d 1480 (11th Cir. 1989) 3

Statues and Rules

28 U.S.C. § 636 8

PETITIONERS' REPLY BRIEF

Rather than engage Petitioners on the questions presented, Respondents attempt to avoid those questions by mischaracterizing the decision below. Instead of addressing the clear, unavoidable conflict between the Eleventh Circuit's "substantial cause" standard for identifying vestiges of past discrimination and decisions of this Court and other Courts of Appeals, Respondents seek to obscure this core holding by characterizing it as dictum. Similarly, Respondents argue that Petitioners have waived any claim that the School Board must show that it will not revert to its discriminatory practices in the future, despite the fact that their failure of proof was an explicit ground of the District Court's decision and before the Eleventh Circuit. Finally, Respondents dismiss the third question presented as also concerned only with dictum, even though the decision below clearly adopts a different standard of review for a District Court's factual findings where the case has been referred to a Magistrate Judge. By failing to confront the issues directly, Respondents concede that they have no substantive response to Petitioners' representation in the petition: that the questions presented involve clear error, or conflict among the Courts of Appeals, and are worthy of this Court's review.

I. THIS COURT SHOULD REVIEW THE ELEVENTH CIRCUIT'S HOLDING ON "SUBSTANTIAL CAUSE."

Respondents refuse to acknowledge that the Eleventh Circuit's holding in this case relies on the novel "substantial cause" standard. Instead, Respondents insist that the decision below rests entirely on the District Court's alleged misuse of one word – that is, when the District Court spoke of Respondents' obligation to "desegregate to the maximum extent practicable," it misstated the applicable legal standard, which requires Respondents only to "desegregate to the extent practicable." Opp. at 12-13; *see* Pet. App. at 32a. *Compare Lockett v. Board of Educ.*, 92 F.3d 1092, 1101

(11th Cir. 1996) [hereinafter *Lockett I*] ("maximum extent practicable"), *with Lockett v. Board of Educ.*, 111 F.3d 839, 842 (11th Cir. 1997) [hereinafter *Lockett II*] ("extent practicable"). According to Respondents, correcting the District Court's use of *Lockett I*'s "incorrect legal standard" and the resulting "taint[] and infect[ion]" of its factual findings was the *only* holding of the Eleventh Circuit; all else is "dicta." Opp. at 14.

A fair reading of the decision below, however, reveals that the Eleventh Circuit's "substantial cause" standard was essential to its holding and not merely dictum. As set forth in the petition, settled precedents dictate that, given a history of *de jure* segregation, existing racial imbalances presumptively violate the Equal Protection Clause. Pet. at 9 (citing *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 209 (1973)). A school board can only overcome the presumption by showing that the imbalances are not traceable at all to past discrimination. *Brown v. Board of Educ.*, 978 F.2d 585, 591 (10th Cir. 1992) (requiring proof that imbalance is "only a product of demographic changes outside the school district's control"); *Jenkins v. Missouri*, 122 F.3d 688, 593 (8th Cir. 1997) ("[P]laintiffs in a school desegregation case are not required to prove 'cause' in the sense of 'non-attenuation.'") (quoting *Keyes*, 413 U.S. at 211 n.17).

Had it followed these precedents, the Eleventh Circuit would have had no choice but to affirm the District Court's ruling, given that court's unambiguous factual finding that Respondents' evidence – demographic and otherwise – failed to prove that existing racial imbalances in Hillsborough County are beyond their control. Pet. App. at 46a-48a, 77a-130a. To reject the District Court's factual findings, therefore, the Eleventh Circuit had to do exactly what it did: adopt a new legal standard, "substantial cause," that required only a minimal showing by Respondents. *See* Pet. App. at 35a ("Where a defendant school board shows that demographic shifts are a substantial cause of the racial

imbalances, the defendant has overcome the presumption of de jure segregation."). With this holding, the Eleventh Circuit effectively shifted the burden of proof to Petitioners: "[Petitioners] were required to show that the demographic shifts were the result of the past desegregative practices or some other discriminatory conduct." Pet. App. at 36a.

In an effort to avoid the patent conflict between this holding and the holdings of the Eighth and Tenth Circuits, Respondents attempt to characterize the ruling below as merely a presumptive framework that did not alter Respondents' overall burden of proof on causation. Opp. at 15. This summary, however, obscures the reality of the Eleventh Circuit's decision. In the Eighth and Tenth Circuits, and even under the plain text of *Lockett II*, a school board must show that existing racial imbalances "are not the result of present or past discrimination on its part." 111 F.3d at 843. Under the Eleventh Circuit's new reading of *Lockett II*, however, a school board can escape responsibility if it can point to demographics as a "substantial cause" of current imbalances, even if other factors originating with the board's past segregative practices are concurrent causes of the imbalances.[1] This holding indisputably shifts the burden of proof to desegregation plaintiffs, even in districts with histories of segregation, a marked shift from the approach of other Courts of Appeals that warrants review by this Court.

---

[1] "Substantial cause" has an established legal meaning and, should the decision below remain in effect, it will undoubtedly inform future desegregation cases in the Eleventh Circuit. "[S]ubstantial cause does not mean sole or predominant cause, but simply a materially contributing factor." *Rainbow Tours, Inc. v. Hawaii Joint Council of Teamsters*, 704 F.2d 1443, 1448 (9th Cir. 1983); *Royal Crown Co. v. Coca-Cola Co.*, 887 F.2d 1480, 1486 (11th Cir. 1989) (holding that plaintiff need show only that defendant's conduct was "*a* substantial cause," not the sole cause, of its harm). Thus, all desegregation defendants in the Eleventh Circuit – but nowhere else – will be able to seek and obtain unitary status even where other factors tied to past segregative practices are also substantial or even predominant causes of current racial imbalances.

Respondents' focus on the supposed disconnect between *Lockett II* and the District Court's use of *Lockett I*'s "maximum practicability" language only obscures the real issue, for a fair reading of *Lockett II* reveals that it could not have been the basis for the decision below. To the extent that *Lockett II* embodies a more lenient practicability standard than *Lockett I* – and Petitioners dispute that it does[2] – practicability standards serve only to delimit the extent to which a school district must go to remedy *de jure* segregation. Here, the District Court expressly followed established precedent and did not hold Respondents responsible for "racial imbalances unrelated to *de jure* segregation." Pet. App. at 79a. As the District Court noted, however, the issue before it was not one of practicability, but causation itself – whether Hillsborough County's imbalances were vestiges of past discrimination, or created by factors beyond Respondents' control. Pet. App. at 52a ("Who has made the determination that [Respondents] did not cause the imbalances?").

Any distinction between *Lockett I* and *Lockett II* as to practicability is irrelevant to this question. The "substantial cause" standard, however, as applied in this case and as it will be applied throughout the Eleventh Circuit, dramatically reduces the burden on desegregation defendants, departs from settled precedent, and warrants review by this Court.

---

[2] Contrary to Respondents' assertions and the Eleventh Circuit's reading of the District Court's ruling, the District Court did not rely upon *Lockett I* for invalid principles of law. Rather, the District Court merely cited *Lockett I* for settled principles of law set forth in the precedents of this Court. For example, in determining that Respondents had not proved that current imbalances in Hillsborough County were unrelated to past *de jure* segregation, the District Court cited *Lockett I* for the unassailable proposition that it must consider whether: (1) current imbalances are proximally connected to past constitutional violations; (2) Respondents had complied with the consent order; and (3) Respondents had demonstrated good faith. Pet. App. at 53a (citing *Lockett I*, 92 F.3d at 1097) (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

II. RESPONDENTS' FAILURE TO ASSURE GOOD-FAITH COMPLIANCE IS PROPERLY BEFORE THIS COURT.

With regard to the second question presented. Respondents do not contest the unassailable principle that proof of a school district's good faith requires a showing that is both retrospective, that a district has complied with the Equal Protection Clause and with court orders, and prospective, that a district is "unlikely . . . to return to its former ways." *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991) *see also Freeman*, 503 U.S. at 491-92 (holding that district must demonstrate "its commitment to a course of action"); Opp. at 24-26. Moreover, apart from an unsupported and conclusory assertion that "all . . . Circuit Courts of Appeal" look to past compliance as evidence of good faith, Respondents do not deny that the Eleventh Circuit's ruling is in clear conflict with the Tenth Circuit's holding in *Dowell* that requires courts to examine "specific policies, decisions, and courses of action that extend *into the future*." *Dowell v. Board of Educ.*, 8 F.3d 1501, 1512 (10th Cir. 1993) (quoting *Brown*, 978 F.2d at 592) (emphasis added). Nor do Respondents point to any proof of such future plans in the record – conceding that the District Court was correct when it held that Respondents had failed to meet their burden of proof. Pet. App. at 54a.

Instead, Respondents complain that Petitioners cannot raise this point now because they did not challenge the Magistrate Judge's report, which looked only at Respondents' past compliance, Opp. at 25, and that, in any event, the District Court's holding was based entirely on Respondents' past noncompliance with its orders. Therefore, according to Respondents, the Eleventh Circuit was right to reverse once it determined that Respondents had been in compliance. *Id.*

Neither of these arguments has merit. The text of the District Court's December 4, 1998 opinion made clear that

Respondents' past compliance and future course of action were both at issue: "The good faith requirement assures parents, students, and the public that they will be protected against further injuries or stigma, by making it unlikely that the school district would return to its former ways." Pet. App. 53a (internal quotations marks and citation omitted). The District Court went on to hold that "[a]n integral part of this proof will be documentation of strategic planning Defendants have engaged in to ensure that discrimination does not occur *in the future*." *Id.* at 54a (emphasis added). Plainly, the District Court properly examined both the retrospective and prospective elements of good faith in denying Respondents unitary status. That Petitioners did not raise prospective good faith in their objections to the Magistrate Judge's report is irrelevant in light of the District Court's consideration of the issue. *See Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989) ("Even if neither party objects to the magistrate's recommendation, the district court is not bound by the recommendation of the magistrate."); *see also DeLeon v. Strack*, 234 F.3d 84, 87 (2d Cir. 2000) ("[I]f in the absence of any party's objection the district court undertakes *de novo* review of a magistrate judge's report, there is no danger that an appellant will raise issues that were never considered by the district court.").

Moreover, and contrary to Respondents' assertions, Petitioners did not abandon this issue in defense of the District Court's ruling before the Eleventh Circuit. *See* Feb. 12, 2000 Brief of Plaintiffs-Appellees at 47 (noting that Respondents did not meet the standards set forth by the Tenth Circuit in *Dowell*, where the school board "not only had demonstrated a good-faith compliance in the past, but also had taken affirmative steps to ensure as much desegregation as practical in the future"). That the Eleventh Circuit improperly ignored Respondents' failure to provide sufficient evidence of future compliance does not thereby preclude Petitioners from raising this question now – if that were the case, appellate courts could shield their decisions from

further review simply by declining to address those bases of the trial court's rulings they find inconvenient.

Finally, there can be no doubt that the Eleventh Circuit's ruling conflicts with the Tenth Circuit's holding in *Dowell.* There, the Tenth Circuit explicitly enunciated prospective compliance as a separate prong of the good-faith inquiry. 8 F.3d at 1501. In a nuanced opinion strikingly at odds with the Eleventh Circuit's ruling below, that Court looked to "future-oriented board policies manifesting a continued commitment to desegregation" rather than "potentially self-serving statements" by school officials. *Id.* By contrast, the Eleventh Circuit looked only to Respondents' past compliance through the purportedly different lens of "practicability" and "maximum practicability." Pet App. at 37a-40a. But regardless of whether this distinction has any meaning for purposes of a court's analysis of the two substantive elements of good faith, the Eleventh Circuit clearly erred and contradicted the Tenth Circuit by failing to require any proof at all of one of these elements. This is particularly true where, as here, Respondents failed to provide any reasonable assurance to the District Court about their future plans. *See* Pet. App. at 54a; Pet. at 24. For this reason, the Court should grant certioriari on the second question presented independent of its decision with regard to the other questions presented.

III. THIS COURT SHOULD REVIEW THE ELEVENTH CIRCUIT'S DEPARTURE FROM THE "CLEARLY ERRONEOUS" STANDARD.

Despite clear statements of the District Court's findings on school assignment, the Court held that "we are convinced that the district judge agreed with the magistrate judge and found that shifting demographics was a substantial cause of the racial imbalances." Pet. App. at 21a. The Eleventh Circuit could only have reached this ruling, however, by abandoning its deference to the trial judge's legally-mandated *de novo* review of the Magistrate Judge's

findings. *See* 28 U.S.C. § 636. For, as noted earlier, the District Court's purportedly improper citation to *Lockett I*'s practicability language is irrelevant to the identification of the cause of current racial imbalances, and therefore cannot have "tainted" or "infected" the District Court's factual findings. In short, it is hard to escape the conclusion that the Eleventh Circuit simply favored the Magistrate Judge's factual findings over those of the District Court – but that alone is insufficient reason to usurp the role of the district judge.

Similarly, the Eleventh Circuit's preference for the Magistrate Judge's findings on good faith over those of the District Court cannot be justified by the District Court's citation to *Lockett I* rather than *Lockett II*. *See Lockett II*, 111 F.3d at 842 ("Under this standard, we are not entitled to 'reverse the finding of the trier of fact simply because [we are] convinced that [we] would have decided the case differently'"). The District Court found, for example, that Respondents' own failure to understand the import of programs such as the majority-to-minority transfer program "cast doubt on the competence of the individuals charged with the task of desegregating the schools," Pet. App. at 134a, particularly since not a single transfer had been approved since the 1971 Order, *id.* at 137a. This finding regarding the competence and good faith of the very individuals charged with compliance is wholly independent of whether Respondents must desegregate to the "extent practicable." Rather, it represents a clearly supportable factual finding that should be respected absent clear error – respect it was not accorded by the Eleventh Circuit. *See* Pet App. at 39a.

Respondents' final arguments regarding the third question presented are merely attempts to retry the facts. *See* Opp. at 28-30. They are not properly before this Court, and in no way do they rehabilitate the clear errors in the Eleventh Circuit's ruling.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioners' opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Elaine R. Jones
Director-Counsel

Norman J. Chachkin
Jacqueline A. Berrien
NAACP Legal Defense
& Educational Fund, Inc.
99 Hudson Street
Suite 1600
New York, New York 10013
(212) 965-2200

Victor A. Bolden
(Counsel of Record)
Jesse M. Furman
Kenneth D. Heath
Wiggin & Dana
One Century Tower
265 Church Street
New Haven, CT 06508
(203) 498-4400

Warren Hope Dawson
Dawson Law Office
1467 Tampa Park Plaza
Tampa, Florida 33605
(813) 221-1800